

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





# TRANSCRIPT OF RECORD.

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## Court of Appeals of the District of Columbia.

JANUARY TERM, 1916.

No. 2903. **295**

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NATIONAL SURETY COMPANY, A CORPORATION OF THE  
STATE OF NEW YORK, APPELLANT,

*vs.*

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR;  
WILLIAM G. McADOO, SECRETARY OF THE TREASURY,  
AND WILLIAM L. DAYTON, TRUSTEE IN BANKRUPTCY  
OF JAMES B. ORMAN AND WILLIAM CROOK, INDIVID-  
UALLY AND AS COPARTNERS TRADING AS ORMAN &  
CROOK.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

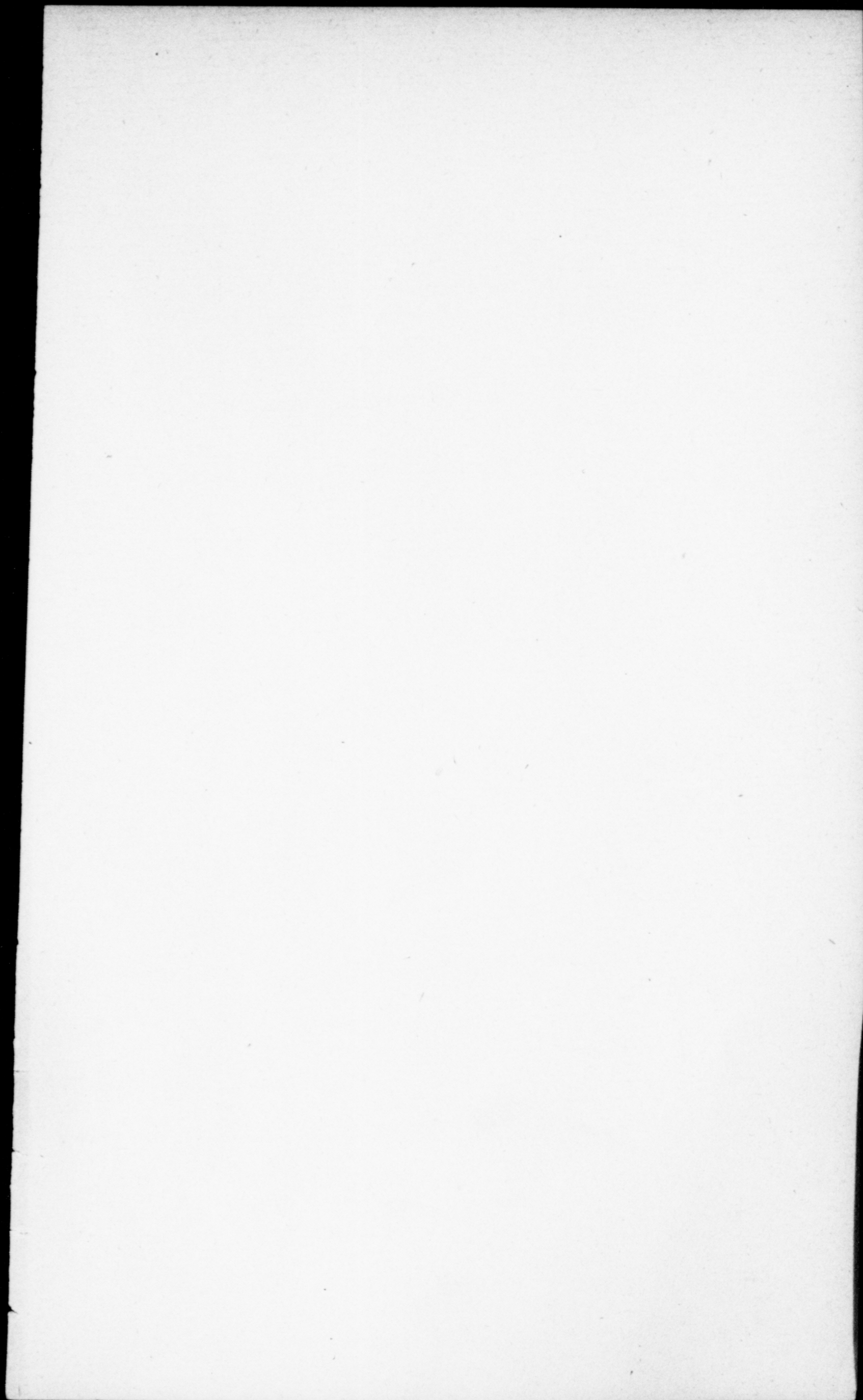
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FILED DECEMBER 6, 1915.

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*March 20 1916*

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# Court of Appeals of the District of Columbia.

JANUARY TERM, 1916.

No. 2903.

NATIONAL SURETY COMPANY, A CORPORATION OF THE  
STATE OF NEW YORK, APPELLANT,

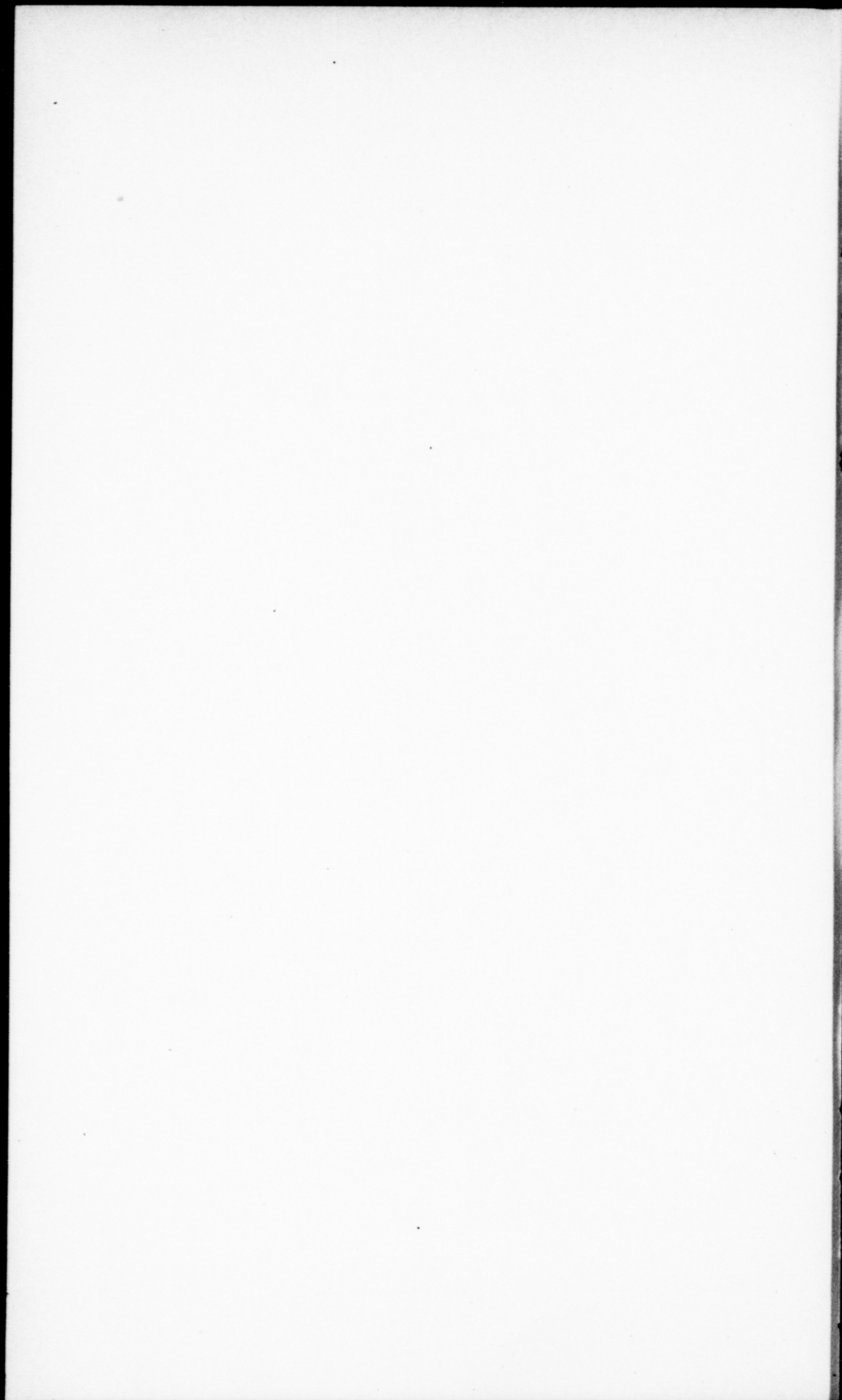
vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR;  
WILLIAM G. McADOO, SECRETARY OF THE TREASURY,  
AND WILLIAM L. DAYTON, TRUSTEE IN BANKRUPTCY  
OF JAMES B. ORMAN AND WILLIAM CROOK, INDIVID-  
UALLY AND AS COPARTNERS TRADING AS ORMAN &  
CROOK, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF  
COLUMBIA.

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# Court of Appeals of the District of Columbia.

No. 2903.

NATIONAL SURETY COMPANY, a Corporation, Appellant,  
vs.  
FRANKLIN K. LANE, Sec'y, &c., et al.

*a* Supreme Court of the District of Columbia.

No. 32470. In Equity.

NATIONAL SURETY COMPANY, a Corporation of the State of New  
York, Plaintiff,

vs.

FRANKLIN K. LANE, Secretary of the Interior; WILLIAM G. Mc-  
Adoo, Secretary of the Treasury, and William L. Dayton, Trustee  
in Bankruptcy of James B. Orman and William Crook, Individ-  
ually and as Co-partners Trading as Orman & Crook, Defendants.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of  
Columbia, at the City of Washington, in said District, at the times  
hereinafter mentioned, the following papers were filed and proceed-  
ings had, in the above-entitled cause, to wit:

1 *Bill.*

Filed February 27, 1914.

In the Supreme Court of the District of Columbia.

No. 32470. Equity.

NATIONAL SURETY COMPANY, a Corporation of the State of New  
York, Plaintiff,

vs.

FRANKLIN K. LANE, Secretary of the Interior; WILLIAM G. Mc-  
Adoo, Secretary of the Treasury, and William L. Dayton, Trustee  
in Bankruptcy of James B. Orman and William Creek, Individ-  
ually and as Co-partners Trading as Orman & Crook, Defendants.

To the Supreme Court of the District of Columbia:

The plaintiff respectfully represents as follows:

1. That the plaintiff is a corporation organized and existing under

the laws of the State of New York and brings this suit in its own right.

2. That the defendant Franklin K. Lane is a citizen of the United States at present residing in the District of Columbia, and is sued in his official capacity as Secretary of the Interior; William G. McAdoo, is a citizen of the United States at present residing in the District of Columbia and is sued in his official capacity as Secretary of the Treasury; and William L. Dayton is a citizen of the United States and resident of the State of Colorado, and is sued in his capacity as trustee in bankruptcy of James B. Orman and William Crook individually and as co-partners trading under the firm name of Orman & Crook.

3. The plaintiff avers that the said James B. Orman and William Crook, co-partners trading under the firm name and style of Orman & Crook, by a writing dated, to wit, the 14th day of November, 1905, contracted with the United States to furnish all the labor and materials necessary and to construct complete at specified unit prices for the different items and classes of work involved, Sections 1, 2 and 3 of the Belle Fourche Dam and Distributing Canals, on the Belle Fourche Reclamation Project, in the State of South Dakota, in accordance with the terms of their proposal and detail specifications attached to and made a part of their said contract.

4. That the United States required as a condition precedent to the award of said contract to the said Orman & Crook, that the said Orman & Crook should and would execute a bond in a penalty and with a surety satisfactory to the United States or its duly authorized agents, conditioned that the said Orman & Crook would faithfully carry out and perform the terms of said contract.

5. That the said Orman & Crook did on, to wit, the 14th day of November, 1905, execute and deliver to the United States or its duly authorized agents, said bond in a penalty of \$120,000 as was required by the said United States, as mentioned in the last preceding paragraph hereof; that at the special instance and request of the said Orman & Crook the plaintiff became surety on said bond and was accepted by the United States or its agents as satisfactory surety thereon.

6. The estimated cost of the aforesaid work (actual cost being dependent on quality of materials furnished and work actually done) at the unit prices agreed was—schedule 1, \$879,164; schedule 2, \$70,129.75; schedule 3, \$54,005.50; or a total of \$1,003,299.25, which was to be paid as provided in paragraphs 38 and 104 of the specifications attached to said contract.

Paragraph 38 provided:

3 “38. Payments.—The payments due shall be made to the contractor upon the presentation of proper accounts, prepared by the engineer and approved by the chief engineer, in accordance with the provisions made therefor and pertaining to the contract. When the work has been completed or all the material has been delivered, to the satisfaction of the chief engineer, and when a release of all claims against the United States on account of



the contract shall have been executed by the contractor, final payment of the balance due will be made."

Paragraph 104 provided:

"104. Estimates and payments.—Payments will be made as follows: At the end of each calendar month the engineer shall make an approximate measurement of all the work done or materials delivered, up to that date, and an estimate of the value of the same, at the prices agreed upon in the contract. A deduction of 20 per cent shall be made from this estimated amount and from the balance shall be deducted the amount of all previous payments. The remainder shall be paid to the contractor upon the presentation of proper accounts, prepared by the engineer and approved by the chief engineer. The 20 per cent so deducted shall be retained by the Government until the work shall have been completed to the entire satisfaction of the chief engineer, and in case of default by the contractor said 20 per cent shall be and become the sole and absolute property of the United States. In the case of Schedule No. 1, after the amount so retained equals \$40,000 the contractor shall be paid the full value of the work done or the materials delivered during each month, and in the case of each of schedules Nos. 2 and 3 after the amount retained equals \$5,000 the foregoing deduction of 20 per cent shall no longer be made, but the contractor shall be paid the full value of the work done or materials delivered during each month. The balance due upon completion of the contract shall be paid as provided in paragraph 38.

7. Paragraph 22 of the specifications forming a part of said contract provided that in the event of unreasonable delay or failure on the part of the said Orman & Crook to prosecute and complete the work, upon due notice—

"Then and in either case the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper or hire such force and buy such machinery, tools, appliances, materials, and animals at the contractor's expense as may be necessary for the proper conduct

4 of the work and for finishing it in the time agreed upon.

Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor."

8. Work was commenced by said Orman & Crook under said contract as provided therein, and in due course said Orman & Crook had completed and received pay for work of the value and amount of \$310,111.91 which included the entire work called for under schedule 3 and the \$5,000 reserve percentages held back under said schedule; but before schedules 1 and 2 had been completed, and when there yet remained to be done under those schedules work of



the estimated value of \$693,187.34, the said Orman & Crook became insolvent and on, to wit, Jan. 16, 1908, filed a voluntary petition in bankruptcy in the United States District Court for the District of Colo., and thereafter in due course of said proceedings the defendant William L. Dayton was appointed trustee in bankruptcy of the estate of said Orman & Crook, and has been since that time and still is acting as such trustee. Thereafter, to wit, on January 22, 1908, the United States pursuant to and in accordance with the authority given it in said contract, suspended the operation of the contract and took possession of machinery tools, appliances, and animals employed on the work being constructed under said contract, and all materials belonging to the contractors delivered on the ground.

9. That at the time of said suspension said Orman & Crook had been paid for all work done, less \$40,000 retained percentages under schedule 1 and \$5,000 retained percentages under schedule 2; and with respect to these retained percentages, paragraph 104 of the specifications provided:

"In case of default by the contractor said 20% shall be and become the sole and absolute property of the United States."

5        10. Thereafter the United States called upon the plaintiff as surety to complete the said contract, and steps were thereupon taken by the plaintiff to secure a contractor or contractors who would undertake the completion of the same, the plaintiff not being equipped itself to undertake the work. Many localities throughout the United States were canvassed for bids. The plaintiffs' officers personally interviewed contractors from Denver, Colo., St. Paul, Minn., Chicago, Ill., New York City, Janesville, Wis., and other cities. After weeks of persistent effort the plaintiff finally secured a bid from Hayes Bros. Company, a corporation of Janesville, Wis., and John W. Peters of the same place, both acting jointly, offering to complete the said contract of Orman & Crook for the balance of the said contract price then remaining in the hands of the Government, which would have become due said Orman & Crook upon their having completed the said work, such balance being estimated at \$683,187.34, including the aforesaid holdbacks on schedules 1 and 2 of \$45,000 and the penalties charged against said Orman & Crook of \$7,050 for failure to complete schedules 2 and 3 within the contract time.

11. This bid was considered a very advantageous one both for the plaintiff and for the Government and contract was accordingly entered into on, to wit, the 2nd day of April, 1908, between the plaintiff on the one hand and the said Hayes Bros. Company and John W. Peters (hereinafter called contractors) on the other hand, whereby and wherein the said contractors agreed among other things, to complete the unfinished work on schedules 1 and 2, in accordance with the terms, conditions, plans and specifications of the original contract of said Orman & Crook, for the balance of the contract price remaining in the hands of the Government, estimated as aforesaid at \$693,187.34, including the aforesaid  
6        holdbacks of \$45,000; and wherein and whereby the plaintiff agreed to assign all warrants and to pay over to the con-



tractors all moneys received by it from the United States upon approved accounts of work done by the contractors under said contract of Orman & Crook, and to assign all warrants and to pay over all moneys received by the plaintiff from the United States as holdbacks on schedules 1 and 2 and for penalties charged against Orman & Crook, as aforesaid, within five days after such warrants or payments or any of them should be received by the plaintiff, and in addition thereto, the plaintiff agreed to pay the contractors the sum of \$14,050, and no more, which latter sum was to be in full for all other obligations and liabilities of the plaintiff to the contractors, \$7,000 thereof to be paid on or before May 20, 1908, and the balance \$7,050 on or before October 20, 1908. The plaintiff also agreed to pay the further sum of \$1,150 towards the premium charged upon the bond which it required to be given by the said contractors for the faithful performance of their said contract. Said contract by its own provisions however, was to become effective only in the event the plaintiff secured from the Government, on or before April 10, 1908, a contract for the completion of the said work, including among other things, provisions for the use by the plaintiff of the plant, materials and animals left on the work by said Orman & Crook, and for the payment to the plaintiff of the \$45,000, holdbacks hereinbefore referred to upon the completion of said contract. A copy of said contract between the contractors and the plaintiff is attached hereto, marked Exhibit A, and is made a part hereof, the same as if herein fully set forth.

12. The plaintiff thereupon took the matter up with James Rudolph Garfield, then Secretary of the Interior and predecessor in office of said defendant Franklin K. Lane, and exhibited to him the aforesaid contract entered into with the said contractors, and the said Garfield, after having the advice of the Attorney General of the United States, or the said Attorney General's assistants, and after considering the advantages to result to the United States from having such contract become binding, the said Garfield, as Secretary of the Interior, on, to wit, the 8th day of April, 1908, acting on behalf of the United States, entered into a contract with the plaintiff for the completion of the work left uncompleted by said Orman & Crook, and agreed to pay to the plaintiff therefor according to the provisions of paragraphs 38 and 104 of the specifications attached to and forming a part of said contract of Orman & Crook, dated November 14, 1905, aforesaid, and further specifically agreed that

"Upon the completion of the contract the percentage heretofore retained under the provisions of paragraph 104 of the specifications shall, subject to the provisions of the said contract of Nov. 14, 1905, be paid to the proper party in interest, viz: the party of the second part."

The party of the second part in said contract was the plaintiff. The said contract of April 8, 1908, contained a further provision that the plaintiff was to have the use without charge of the plant, materials, machinery, etc., taken over by the United States from said Orman & Crook, upon the suspension of their contract as



aforesaid, and otherwise met the conditions specified in the contract of April 2, 1908 with the contractors, and made said contract of binding force and effect. The said contract of April 8, 1908, between the plaintiff and the United States is attached hereto, marked Exhibit B, and is made a part hereof as if fully herein set forth.

8        13. The said contractors thereafter at once entered upon the performance of the work left uncompleted by the said Orman & Crook, and the same has now been fully completed in accordance with the plans and specifications of said contract and has been accepted by the United States, and all payments therefor, except as hereinafter mentioned, have been made by the United States to the plaintiff as provided in the aforesaid contract with plaintiff of April 8, 1908, and the said checks or warrants in payment were all promptly endorsed and paid over by the plaintiff to the contractors as provided in plaintiff's said contract with them of April 2, 1908.

14. Upon completion and acceptance of said work the account was stated by the officials of the Reclamation Service, acting under the direction of defendant, Franklin K. Lane, and there was found to be a balance due to the plaintiff from the United States under the aforesaid contract of April 8, 1908, of \$24,860.18, upon approved accounts of work done pursuant to the terms of said contract, and a further sum of \$44,798.22 as holdbacks or reserve percentages, which had been withheld from Orman & Crook on work done by them prior to the suspension of the operation of their said contract. However, notwithstanding the account has been stated as aforesaid and the amount due definitely and finally determined, and notwithstanding the aforesaid sums are admitted to be due to the plaintiff according to the terms of the aforesaid contract of April 8, 1908, between the United States and the plaintiff, yet the defendant Franklin K. Lane, has failed and refused to pay said \$44,798.22 to the plaintiff and has informed the plaintiff that he will not do so except on the consent of the aforesaid defendant William L. Dayton, trustee in bankruptcy of said Orman & Crook, or upon the order of a Court of competent jurisdiction; and  
9        further refuses to pay said \$24,860.18 to the plaintiff, unless the plaintiff will first execute and deliver to the United States a release in full of all claims and damages of whatsoever kind or character arising under or by virtue of the aforesaid contract of April 8, 1908.

15. The plaintiff further avers that on, to wit, the 3rd day of December 1913, the said contractors filed suit in the Circuit Court for Rock County, State of Wisconsin, against this plaintiff, claiming and demanding from this plaintiff, among other sums, the sum of \$69,658.40 alleging that it is the duty of this plaintiff to demand and receive from the United States said sums of \$69,658.40; that is to say \$24,860.18, for work done by said contractors, and \$44,798.22 as holdbacks from Orman & Crook as aforesaid; and that upon the refusal of the United States to pay the same to this plaintiff, it is the duty of this plaintiff to resort to such measures as may be necessary to enforce the payment of said sum to this plaintiff,



in accordance with the terms of the aforesaid contract of April 8, 1908. Further proceedings in said suit have been suspended temporarily by agreement between the parties thereto in order that this plaintiff might have an opportunity to enforce its claims to the aforesaid fund of \$69,658.40 being withheld from payment by defendant Franklin K. Lane as aforesaid.

16. The said contractors in said suit further allege that in the month of May, 1908, after they had commenced work and had taken possession of the horses, wagons, etc. left upon said work by said Orman & Crook, one Mark Young claimed to own a large number of said horses, wagons, harness and other equipment; that upon investigation the said contractors learned that said Young had given  
10 a chattel mortgage covering said property claimed by him to one Pettigrew of Belle Fourche, South Dakota, and further learned that the United States also had a lien on said horses, wagons and other equipment, for the care and keep of the same; and upon investigation, learned that said Young was in fact the owner of said horses, wagons, harness, etc. claimed by him, and that, the said contractors were compelled, in order to have the use of said property, to pay and discharge said lien of the United States, and said chattel mortgage of said Pettigrew and to pay said Young for said property, said payments altogether aggregating the sum of \$7,000, and accordingly demand is made upon this plaintiff, who is the defendant in said suit, for the said \$7,000, with interest thereon from the 1st day of October, 1908.

The said contractors further allege that after entering into the contract of April 2, 1908, and commencing work upon said project, as aforesaid, they also learned that the United States had a claim upon all of the said horses, mules, wagons, etc., taken over from Orman & Crook, as aforesaid, for care and keep during the time of the suspension of the said Orman & Crook contract; and that, in order to get the use of said property, it became necessary for the said contractors to discharge the said lien of the United States by allowing the United States to deduct from the payments due said contractors for work done by them under their contract the sum of \$4,594.87, which the said contractors demand of this plaintiff, the defendant in said suit.

The said contractors further allege in said declaration that this plaintiff promised and agreed to pay to them the further sum of \$7,050, which had been deducted by the United States from payments due said Orman & Crook on account of the failure of said  
11 Orman & Crook to complete schedules 2 and 3 within the time agreed and demand of this plaintiff that it pay to them the said sum of \$7,050 with interest thereon from the 1st day of July, 1911. For greater accuracy and particularity as to the allegations and demands of said contractors against this plaintiff in said suit, reference is hereby made to the declaration filed therein, a true copy of which is attached hereto, marked Exhibit C, and is made a part hereof as if fully herein set forth.

17. The plaintiff further avers that the said Orman & Crook, at the time they made application to the plaintiff for the bond of



\$120,000 aforesaid and at the time the plaintiff agreed to execute said bond and as a part of the consideration for the execution of said bond by the plaintiff, the said Orman & Crook agreed with the plaintiff that they would at all times indemnify and keep indemnified the plaintiff and save it harmless from and against any and all liability, damage, or loss, which the plaintiff should or might at any time sustain or incur or become liable for by reason of having executed said bond. A copy of said agreement and a copy of said bond are attached hereto marked Exhibits D and E respectively, and are made a part hereof, as if fully herein set forth.

18. That, in addition to the aforesaid demands of said contractors against this plaintiff, which total the sum of \$78,014.10, and which, or a large part of which, this plaintiff may be compelled to pay; the plaintiff has already, by reason of the aforesaid default of said Orman & Crook, been compelled to pay out as costs, expenses, damage and loss the following sums:

|    |                                                                                                                                                                                                  |             |
|----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| 12 | Mar. 10, 1908. For expenses of William J. Griffin in traveling from New York City to Washington, D. C., and return, and for sustenance while in Washington in connection with said contract..... | \$75.00     |
|    | Apr. 3, 1908. For expenses of J. G. White Co., contractors of N. Y. City in examining into plans and specifications of said work.....                                                            | 23.70       |
|    | Mar. 30, 1908. For expenses of William J. Griffin, New York City to Chicago and return.....                                                                                                      | 100.00      |
|    | Apr. 7, 1908. Expenses of William J. Griffin, New York City to Washington, D. C., and return.....                                                                                                | 35.00       |
|    | Apr. 11, 1908. Expenses of Ralph W. Smith from Denver, Colo., to Washington, D. C., and return, including expenses of W. L. Bradbury, a contractor of Denver, Colo.....                          | 212.80      |
|    | Apr. 14, 1908. Hayes Brothers Co. and John W. Peters $\frac{1}{2}$ allowance by National Surety Co. on bond securing the contract of Hayes Brothers Co. and John W. Peters                       | 575.00      |
|    | Apr. 24, 1908. Fees of La Fleiche & Simons in defeating claim against contract of Orman & Crook.....                                                                                             | 150.00      |
|    | May 16, 1908. Hayes Brothers Co. and John W. Peters, amount agreed to be paid under contract with them by National Surety Company .....                                                          | 7,000.00    |
|    | June 2, 1908. Expenses of Newman & Hoy, contractors, St. Paul, Minn.....                                                                                                                         | 322.00      |
|    | Oct. —, 1908. Hayes Brothers Co. and John W. Peters, amount agreed to be paid them under contract of National Surety Company .....                                                               | 7,050.00    |
|    | Apr. —, 1909. Hayes Brothers Co. and John W. Peters, balance of allowance by National Surety Company for expenses of bond of said Hayes Bros. Company and John W. Peters .....                   | 575.00      |
|    | Total.....                                                                                                                                                                                       | \$16,117.70 |



19. That the plaintiff is informed by said defendant Franklin K. Lane, through his subordinate, the Acting Director of the Reclamation Service, that, unless this plaintiff either reaches an agreement with said Orman & Crook, or their legal representatives, on or before February 28, 1914, as to the disposition to be made of the said fund \$44,768.22, or institutes proper Court proceedings asserting its claim to the same, the said sum will, on or after said date, be paid to said Orman & Crook, or their legal representative. The plaintiff has endeavored to come to a satisfactory agreement with defendant William L. Dayton, trustee in bankruptcy of said Orman & Crook, but has been unable to do so, and therefore avers that the said fund of \$44,768.22 is now about to be paid to said defendant William L. Dayton, as such trustee in bankruptcy, and will be paid to him, to the great and irreparable injury of the plaintiff, unless this Court intercedes to prevent such payment and to order the said sum paid to this plaintiff or to a Receiver or Receivers to be appointed by this Court.

20. The defendant William G. McAdoo is joined as a party to this suit because the fund out of which the aforesaid indebtedness will be paid is now in the Treasury of the United States subject to the direction and control of said defendant, and in regular course the payment will necessarily have to be made by him or under his direction. The plaintiff is informed, and believes and therefore avers that according to the usual and prescribed procedure, payments of this character and amount are made by the officials of the Reclamation Service, acting under the direction and control of defendant Franklin K. Lane, preparing a voucher showing the amount due and the name of the payee, and after the payee has certified thereon that the amount stated is correct and just and payment has not been made, this voucher is forwarded to the defendant, William G. McAdoo or the proper officials of the Treasury Department, acting under his direction and control, for payment; and that after the proper notations and records have been made, a warrant is drawn and delivered to the order of the payee and in the amount stated in said voucher.

The premises considered your plaintiff prays as follows:

1. That the U. S. writ of subpoena may issue out of this Court directed to the defendants and each of them, commanding them and each of them to appear and answer the exigencies of this bill, but not under oath, answer under oath being hereby expressly waived.

2. That the defendant William L. Dayton, trustee in bankruptcy of James B. Orman and William Crook, individually and as co-partners trading under the firm name of Orman & Crook, his agents, attorneys, assigns or successors in office, may be enjoined and restrained from receiving the aforesaid fund of \$44,687.22 or any part thereof, or any check or warrant issued for same and that the said Franklin K. Lane, Secretary of the Interior and William G. McAdoo, Secretary of the Treasury, their agents, or successors in office, may be enjoined and restrained from issuing a voucher, draft,



or warrant for said funds to said William L. Dayton, or in any wise disposing of said fund until the further order of this Court.

3. That a Receiver or Receivers be appointed by this Court to demand and receive said funds, or any check, or draft or warrant issued for the same, and that said Receiver or Receivers hold said fund and dispose of the same under the order of this Court for the protection of this plaintiff.

4. That the defendant Franklin K. Lane, Secretary of the Interior be ordered and directed to pay the whole of the aforesaid sum of \$69,658.40, or cause the same to be paid to the plaintiff,  
15 or to said Receiver or Receivers to be appointed by this Court.

5. That the plaintiff be decreed to be entitled to receive the whole of the aforesaid sum of \$69,658.40 balance admitted to be due from the United States for the performance and completion of schedules 1, 2 and 3 of the Belle Fourche Dam and Distributing Canals as called for in the aforesaid contract of Nov. 14, 1905, between Orman & Crook and the United States.

6. That the plaintiff may have such other and further relief as the case may require and to this Court may seem meet and proper.

NATIONAL SURETY COMPANY,  
By W. H. RONSAVILLE, *Res. Mgr.*

B. E. HINTON,  
*Attorney for Plaintiff.*

W. H. Ronsaville being duly sworn, deposes and says that he is the Resident Manager of the National Surety Company, the plaintiff named in the foregoing bill of complaint and is acquainted with the matters and facts set forth therein and is authorized to verify the same; that he has read the same over and knows that the matters alleged therein are true, except such matters as are alleged on information and belief and as to those he believes they are true.

W. H. RONSAVILLE.

Subscribed and sworn to before me this 27th day of Feb'y 1914.  
[SEAL.]

N. S. FAUCETT,  
*Notary Public.*

16

*Decree Appointing Receiver.*

Filed July 21, 1914.

\* \* \* \* \*

This cause came on to be further heard at this term of Court upon the bill of complaint and rule to show cause issued thereon and the answer of defendants, William G. McAdoo, Secretary of the Treasury, and Franklin K. Lane, Secretary of the Interior, to said bill of complaint and rule to show cause and was duly considered by the Court, and it appearing to the Court that defendant, William L. Dayton, Trustee in Bankruptcy, of James B. Orman and William Crook, individually and as co-partners trading as Orman & Crook, is



before the Court, having been brought in by publication, it is thereupon this 21st day of July, A. D. 1914, by consent of parties,

Adjudged, ordered and decreed, that the Munsey Trust Company of Washington, D. C., be and it is hereby appointed Receiver in this cause (to serve without compensation and pay interest at the rate of 2½% per annum on all funds coming into its hands as such Receiver) with authority to sign, execute and deliver to the Secretary of the Interior and the Secretary of the Treasury, or either of them, as said officers may require, on behalf of William L. Dayton, Trustee in Bankruptcy of James B. Orman and William Crook, individually and as co-partners trading as Orman & Crook, a release or releases of all claims against the United States on account of the contract dated November 14, 1905, between the United States and James B. Orman and William Crook, co-partners trading under the firm name and style of Orman & Crook, and on behalf of the National Surety Company, a release or releases of all claims against the United States on

17 account of the contract dated April 8, 1908, between the United States and the National Surety Company, and thereafter demand, collect and receive from the defendant, William G. McAdoo, Secretary of the Treasury or Franklin K. Lane, Secretary of the Interior, the sum of sixty-nine thousand, six hundred and twenty-eight dollars and thirty cents (\$69,628.30), or whatever balance there may be found due from the United States for the performance and completion of the work called for under the contract, dated the 14th day of November, 1905, between the United States and James B. Orman and William Crook, co-partners trading under the firm name and style of Orman & Crook, and under the contract of April 8, 1908, between the United States and the National Surety Company, and the said Receiver shall hold the same subject to the further order of this Court.

It is further ordered that the defendants, William G. McAdoo, Secretary of the Treasury, and Franklin K. Lane, Secretary of the Interior, after having obtained from the Receiver herein appointed the releases, executed by the Receiver herein appointed on behalf of the defendant, William L. Dayton, Trustee in Bankruptcy of James B. Orman and William Crook, individually and as co-partners trading as Orman & Crook, and the plaintiff, National Surety Company, of all claims against the United States on account of the contracts covered by these proceedings herein provided for, be and they are hereby authorized and directed to pay to said Munsey Trust Company, Receiver herein appointed, the sum of sixty-nine thousand, six hundred and twenty-eight dollars and thirty cents (\$69,628.30), or whatever balance may be found due from the United States for the performance and completion of the contracts aforesaid; and the receipt of the Receiver herein appointed for said amount shall be full acquittance to the United States for any and all claims and

18 demands, either at law or in equity, of the parties hereto arising out of or in any wise connected with the said contracts.

It is further ordered, That upon payment of the said sum by the defendants, William G. McAdoo, Secretary of the Treasury, and Franklin K. Lane, Secretary of the Interior, or either of them to



said Munsey Trust Company, Receiver aforesaid, as herein provided, that this suit shall be and the same is hereby dismissed as to said defendants, William G. McAdoo, Secretary of the Treasury and Franklin K. Lane, Secretary of the Interior, without costs to said defendants.

By the Court:

WRIGHT, *Justice*.

We consent.

J. S. EASBY-SMITH,  
*Att'y for Def't Dayton.*

C. EDWARD WRIGHT,  
*Ass't Att'y, Att'y for Franklin K. Lane.*

B. E. HINTON,  
*Att'y for Plt'f, National Surety Co.*

CLARENCE R. WILSON,  
*U. S. Attorney, D. C., Att'y for D'f'd't Wm. McAdoo.*

*Order Authorizing Partial Distribution.*

Filed July 24, 1914.

\* \* \* \* \*

Upon motion of plaintiff and consent of defendant, William L. Dayton, Trustee in Bankruptcy, it is by the Court this 24th day of July, 1914,

Ordered, that the Munsey Trust Company, Receiver herein be and it is hereby authorized, immediately upon receipt from the United States of the sum of \$69,628.30 described in these proceedings, to pay to the National Surety Company the plaintiff herein the sum of \$24,860.08.

By the Court:

WRIGHT, *Justice*.

J. S. EASBY-SMITH,  
*Att'y for Defendant Wm. L. Dayton.*

B. E. HINTON,  
*Att'y for Plaintiff, National Surety Co.*

*Answer of Defendant Dayton.*

Filed September 11, 1914.

\* \* \* \* \*

Comes now the defendant, William L. Dayton, Trustee as aforesaid, and especially saving and reserving unto himself now, and at all times hereafter, all and all manner of benefit or advantage of objections or exceptions which can or may be had to the manifold errors and imperfections of said bill of complaint, for answer to said bill of complaint, or to so much thereof as this defendant is advised it is necessary and material for him to answer, answering says:



1 & 2. Defendant admits the allegations contained in paragraphs numbered one and two of said bill of complaint, and further says that he is trustee in bankruptcy of said Orman & Crook, in a bankruptcy cause now pending in the United States District Court for the District of Colorado.

3. This defendant admits the allegations contained in the third paragraph of said bill; but in so far as the allegations in said paragraph, and any and all allegations in the whole of said bill of complaint, refer to or attempt to set forth the contents of said contract of November 14th, 1905, and the specifications forming part of said contract, this defendant refers to said contract and to the advertisement, proposals, and specifications attached to and made part of said contract; a copy of said contract and of said advertisement and proposal and specifications being attached hereto and made part hereof, marked respectively Exhibit one and Exhibit two.

4. This defendant believes that the allegations contained in the fourth paragraph are true, but for more complete answer refers to said contract and specifications.

20 5. This defendant admits as substantially true the allegations contained in the fifth paragraph of said bill, but for more complete answer refers to the aforesaid contract and specifications, and to said bond, a copy of which is attached to the said bill of complaint marked Exhibit E.

6. Answering the allegations contained in paragraph six this defendant admits said allegations except that it says that the agreed price for schedule number three was \$53,005.50, instead of \$54,005.50, as alleged in said paragraph, and that the agreed price for schedule two was \$71,129.75, instead of \$70,129.75 as alleged in said paragraph; and for further answer this defendant refers to said contract and specification, namely, Exhibit 1 and Exhibit 2, of this answer.

7. This defendant believes the allegations contained in the seventh paragraph to be true, but for more complete answer refers to the said contract and specifications, and to said paragraph twenty-two of said specifications, and to such other portion or portions of said contract and specifications as may be pertinent and material.

8. Answering the allegations contained in the eighth paragraph of said bill defendant says that the said Orman and Crook duly undertook the work under said contract and on, to-wit, January 16th, 1908, had entirely completed that portion of the work provided for under schedule three of said specifications, and were paid in full therefor, including \$5,000 of retained percentages which the United States had withheld until completion of said schedule three, under the terms of said contract and specifications. Said Orman & Crook had also completed the work so undertaken by them under schedule

21 number two of said specifications with the exception of a small amount of work of the value of \$291, and were fully paid for the work under said schedule two with the exception of \$5,000 of retained percentages which the Government had withheld, and still withholds, under the terms of said contract and specifications. Said Orman & Crook had also performed a large



amount of work under schedule number one, and had been paid in full for said work with the exception of approximately \$40,000 of retained percentages which had been withheld by the Government under the terms of said contract; the aggregate of the retained percentages so withheld by the Government under schedules one and two having been stated by the accountants and auditors of the United States as amounting to the sum of \$44,768.22. There did remain to be performed at said time, to-wit, January 16th, 1908, a large amount of work under schedule one of said specifications, but whether the estimated value of said work was \$698,187.34 or not, this defendant does not know, and is unable to admit or deny and calls for strict proof thereof. Said Orman & Crook did become bankrupt as alleged and this defendant was appointed and is the qualified trustee in bankruptcy of the estate of said Orman & Crook. Defendant admits that on, to-wit, January 22d, 1908, the United States did suspend the operations of said contract and did take possession of machinery, tools, appliances and animals employed on said work and materials to be used in said work, all of which belonged to said Orman & Crook and were of great value, to-wit, \$150,000, for which no accounting has been made to said Orman & Crook or to this defendant by the United States or by the plaintiff or by any other person or persons; and this defendant demands from the plaintiff strict proof of the value of said machinery, tools, appliances, animals and materials.

22        9. For answer to the allegations contained in the ninth paragraph of said bill this defendant refers to the preceding paragraph number eight of this answer, and to said contract and specifications, namely Exhibit one and Exhibit two of this answer.

10. Answering the allegations contained in the tenth paragraph of said bill this defendant says that he does not know and, therefore, is unable to say whether the United States called upon plaintiff, as surety of said Orman & Crook, to complete said contract, or whether the plaintiff came forward upon the bankruptcy of said Orman & Crook and the suspension of said contract, and offered and undertook to complete said work; and concerning the allegations of said paragraph in this regard this defendant demands strict proof. This defendant does not know, and for that reason can neither affirm nor deny that the said plaintiff was not equipped to undertake this work; that many localities were canvassed for bids; that plaintiff's officers personally interviewed many contractors; and calls for strict proof of said allegations if the same be deemed material. This defendant has no knowledge of any negotiations between the plaintiff and said Hayes Brothers Company and John W. Peters, and calls for strict proof of these and of all the remaining allegations of said paragraph, if the same be deemed material.

11. Answering the allegations of the eleventh paragraph this defendant says that he has no knowledge as to whether or not the bid of Hayes Brothers and Peters was considered advantageous, both on the part of the plaintiff and for the Government, and if the same be deemed material, demands strict proof thereof. Answering the re-



maintaining allegations of said paragraph this defendant is informed and believes and admits upon information and belief that the  
23 plaintiff did, on the 2d day of April, 1908, enter into a contract with Hayes Brothers Company and Peters, a copy of which contract is attached to the bill of complaint marked Exhibit A. So far as concerns the remaining allegations of fact contained in said eleventh paragraph and in said contract marked Exhibit A to the bill of complaint, this defendant has no knowledge and is unable either to affirm or deny the same and calls for strict proof thereof, if the same be deemed material.

12. Answering the allegations contained in the twelfth paragraph this defendant says that he has no knowledge of the alleged negotiations between the plaintiff and the Secretary of the Interior, and so far as concerns the said contract of April 8th, 1908, between plaintiff and the United States this defendant refers to the contract itself, a copy of which plaintiff has attached to its bill marked Exhibit B, proof of which contract this defendant demands if the same be material.

13. Answering the allegations contained in the thirteenth paragraph this defendant has no knowledge of the work performed by the plaintiff or by the said Hayes Brothers Company and Peters, but believes that said work has been completed in accordance with the plans and specifications and that all payments have been made except the said retained percentages, approximately \$45,000, which are due to this defendant as trustee in bankruptcy of said Orman & Crook, and said \$24,860.08 due from the United States under the original contract of November 14, 1905.

14. Answering the allegations contained in the fourteenth paragraph this defendant is informed and believes (the source of his information being official documents and the answers in this  
24 cause filed by the Secretary of the Interior and the Secretary of the Treasury, respectively) that there is due from the Government to this defendant \$44,768.22 of retained percentages and that there is also due, from the United States, under the original contract of November 14th, 1905, the sum of \$24,860.08. This defendant admits that the accounts concerning said contract have been stated by the accountants and auditors of the United States, but denies that said sums, or any part thereof is admitted to be due to the plaintiff. He admits, upon information and belief that the said defendant Lane has refused to pay said sums to the plaintiff. And further answering the allegations of said fourteenth paragraph this defendant says that the Comptroller of the Treasury has rendered four decisions concerning the accounts under said contract, said decisions being dated respectively, November 22, 1907, December 28, 1907, August 6, 1908, and November 11, 1913. Copies of said decisions are attached hereto marked, respectively, Exhibit 3, Exhibit 4, Exhibit 5 and Exhibit 6, and this defendant makes said exhibits a part of this, his answer, and upon information and belief avers that the statements of fact contained in said decisions are true.

15 and 16. Answering the allegations contained in paragraphs fifteen and sixteen this defendant says that he has no knowledge of



the allegations concerning suit against the plaintiff in the State of Wisconsin, but is informed and believes that the complaint in said suit as set out in Exhibit C attached to said bill is true. This defendant has never seen the answer of the defendant in said suit, namely, the National Surety Company, plaintiff herein, but is informed and believes and upon such information and belief avers that the said National Surety Company sets up and claims among other things, as a defense in said suit, that it is not obliged to pay to the  
25 said contractors, being plaintiffs in said suit, the sum of approximately \$45,000, being the amount of retained percentages, under schedules one and two aforesaid, except in the event that the said National Surety Company succeeds in having the United States pay said sum to it, the said National Surety Company. This defendant is informed and believes, and therefore avers that the said National Surety Company has not paid said sum approximating \$45,000 of retainer percentages, or any part thereof, to the said contractors, Hayes Brothers and Peters. Defendant admits on information and belief that proceedings in said suit have been temporarily suspended pending the determination of this cause.

17. Answering the allegations contained in the seventeenth paragraph this defendant refers to the agreement and bond mentioned in said paragraph and attached to said bill marked Exhibit D and Exhibit E, respectively.

18. Answering the allegations of the eighteenth paragraph this defendant has no knowledge of said allegations and if they be deemed material he demands strict proof thereof.

19. Answering the allegations of the nineteenth paragraph this defendant, upon information and belief, admits said allegations to be substantially true.

20. This defendant says that he is advised that it is not necessary that he make answer to the allegations contained in this paragraph.

In conclusion this defendant denies the right of the plaintiff to the said fund, approximating \$44,768.22, or any part thereof, but, on the contrary, avers that this defendant is entitled to receive the whole of said fund. This defendant further avers that he is entitled to, and  
26 the plaintiff has failed and refused to make, a full and complete discovery and accounting by the plaintiff of and concerning all of its operations and all receipts, use, and disbursements of machinery, tools, animals, materials and moneys about and concerning the said contract and its completion by the plaintiff or by the person or persons employed by the plaintiff, and this defendant prays for such discovery and accounting, and for a decree for the payment to him of said sum of \$44,768.22, together with such additional amount as the Court, after discovery and accounting, may find to be due from the plaintiff to this defendant.

WILLIAM L. DAYTON, *Trustee*,  
By JAMES S. EASBY-SMITH,  
*His Attorney.*

DISTRICT OF COLUMBIA, ss:

I, James S. Easby-Smith, being duly sworn, on oath say: I am the attorney for the defendant William L. Dayton, Trustee, who is a non-



resident of the District of Columbia, and is absent from the District of Columbia; that I have read the foregoing answer subscribed for him by me and know the contents thereof; that the matters and things therein stated of my own knowledge are true, and those stated upon information and belief, I believe to be true.

JAMES S. EASBY-SMITH.

Subscribed and sworn to before me this 11th day of September, A. D., 1914.

[SEAL.]

RALPH B. FLEHARTY,  
*Notary Public, D. C.*

JOHN L. HARGROVE,  
JAMES S. EASBY-SMITH,

*Attorneys for Defendant William*

*L. Dayton, Trustee.*

HARVEY RIDDELL,  
G. P. RITTER,  
*Of Counsel.*

27

EXHIBIT 6.

Filed February 25, 1915.

TREASURY DEPARTMENT,  
November 11, 1913.

The Honorable The Secretary of the Interior.

SIR: I am in receipt of your letter of the 5th instant requesting my decision as to the propriety of paying to the National Surety Company the sum of \$44,768.22, retained by you from the contract price of work done by Messrs. Orman and Crook under contract of November 14, 1905, as additional security for the full and proper completion of the work covered by said contract, said Orman and Crook having failed to complete the work and the same having been completed by their surety, the National Surety Company.

By contract of November 14, 1905, Orman and Crook, a partnership undertook and agreed, under penalty of a bond conditioned upon a due compliance with provisions of said agreement, with the National Surety Company as surety thereon, to construct and complete, at specified unit prices for the different items and classes of work involved, sections one, two and three of the Belle Fourche dam and distributing canals, in accordance with the terms of their proposal and detailed specifications thereto attached and made a part of said contract.

The estimated cost (actual cost being dependent on quantity of materials furnished and work actually done) at united prices agreed upon was \$879,164.00 for Schedule 1, \$70,129.75 for Schedule 2 and \$53,005.50 for Schedule 3. All work was, it was agreed (par. 102) to be commenced within fifteen days and to be fully completed, Schedule 1 by September 1, 1909; Schedule 2 by May 1, 1907 and Schedule 3 by September 1, 1906.

28

Paragraphs 21 and 22 of the specifications were as follows:

3—2903a



Paragraph 21 of the specifications provided that delays due to acts of Providence, fortuitous events and the like would, on a proper showing, be excused, i. e. entitled the contractors to like additional time, and that—

“In case the contractors should fail to complete the work in the time agreed upon in the contract, or in such extra time as may have been allowed, for delays as herein provided, the engineer shall compute and appraise the direct damages for the loss sustained by the United States on account of further employment of engineers, inspectors, and other employees, including all disbursements on the engineering account, properly chargeable to the work. The amount so appraised and computed is hereby agreed upon as liquidated damages, and shall be deducted from any money due the contractor under his contract, and the contractor and sureties shall be liable for any excess. The decision of the chief engineer as to the appraisal of such damages shall be final and binding on both parties. Any provisions in the detail specifications concerning deduction for delay shall be held as modifying or revoking the provisions herein.”

Paragraph 22 of the specifications further provided that, in event of unreasonable failure or delay on the part of the contractor to prosecute and complete the work, upon due notice,—

“then and in either case the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials, and animals at the contractor's expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor. The failure to order improvement of methods or increase of force, plant or efficiencies will not relieve the contractor from his obligation to perform good work or finish in time agreed upon.”

29      The time and manner of making payment for work done under said contract were fixed by par. 104 of the specifications as follows:

“104. Estimates and payments. Payments will be made as follows: At the end of each calendar month the engineer shall make an approximate measurement of all the work done or materials delivered, up to that date, and an estimate of the value of the same, at the prices agreed upon in the contract. A deduction of 20 per cent shall be made from this estimated amount and from the balance shall be deducted the amount of all previous payments. The remainder shall be paid to the contractor upon the presentation of proper accounts, prepared by the engineer, and approved by the chief engineer. The 20% so deducted shall be retained by the government



until the work shall have been completed to the entire satisfaction of the chief of engineers, and in case of default by the contractor said 20% shall be and become the sole and absolute property of the United States. In the case of schedule No. 1, after the amount so retained equals \$40,000 the contractor shall be paid the full value of the work done or the material delivered during each month, and in the case of each of Schedules Nos. 2 and 3 after the amount retained equals \$5,000 the foregoing deduction of 20 per cent shall no longer be made, but the contractor shall be paid the full value of the work done or materials delivered during each month. The balance due upon completion of the contract shall be paid as provided in paragraph 38."

Paragraph 38 provided:

"\* \* \* When the work has been completed or all materials has been delivered, to the satisfaction of the chief engineer, and when a release of all claims against the United States on account of the contract shall have been executed by the contractor, final payment of the balance due will be made."

Work was commenced in due course and on January 22, 1908, schedule 3 had been entirely completed and paid for (including the \$5,000, reserved percentages; see 43 MS Comp. Dec. 1466, Dec. 28, 1907; 43 Id., 826, Nov. 22, 1907), and schedule 2 was practically completed, while much of the work incident to schedule 1 remained to be done.

On that date Orman and Crook having become bankrupt and the work not having been carried on as agreed, the contract, under paragraph 22 supra, after due notice, was suspended.

At the time of said suspension Orman and Crook had been paid for all work done, less \$40,000 retained percentages, Schedule 1 and \$5,000, Schedule 2. No further payments have been  
30 made to Orman and Crook, and it is stated that the \$45,000 retained had been, owing to proper charges (on what account not stated) reduced to \$44,768.22, which is the net amount now in the hands of the government on account of the retentions noted.

Under the contract terms (par. 23, supra), on the suspension of the contract, the government had the right to complete the unfinished work and charge the contractors, and their surety, with any excess in cost of the same over and above what the same work would have cost at contract rates, and to avoid the government so doing, the contractor's surety, the National Surety Company, came forward and itself proposed to complete the undertaking of its principals. In accordance with this offer on the part of the National Surety Company a contract in due form was entered into by the terms of which (contract dated April 8, 1908) the said company agreed—

"to construct and complete the work therein (i. e. in the Orman and Crook contract of November 14, 1905), provided for left uncompleted by Orman and Crook, in accordance with the terms and at the prices set forth in said contract \* \* \* Provided, that the time of completion of Schedule No. 1 of said contract is hereby extended to December 1, 1910, and the party of the second part shall be allowed the use without charge of all machinery, tools, appliances and animals



taken over (from Orman and Crook) by the United States under the terms of paragraph 22 of the specifications \* \* \*

"For and in consideration of the faithful performance of the stipulations of this contract, the party of the second part shall be paid upon the presentation of proper accounts prepared by the engineer, and approved by the chief engineer, as provided in paragraphs 38 and 104 of the specifications attached to and forming a part of said contract of November 14, 1905. Upon the completion of the contract the percentage heretofore retained (from Orman and Crook, this being the \$44,768.22 now in question) under the provisions of paragraph 104 of the specifications shall, subject to the provisions of said contract of November 14, 1905, be paid to the proper party in interest, viz, the party of the second part."

As before stated, at the time Orman and Crook defaulted, the work on schedule 2 was practically, but not quite completed. The  
31 National Surety Company completed this work in short order at a cost of less than \$300 and thereupon claimed pay, at the agreed unit prices, for doing the same, which was allowed, and also the \$5,000 theretofore retained from Orman and Crook which latter claim was disallowed, (see decision of this office dated August 6, 1908, 46 MS. Comp. Dec. 772).

Schedule No. 1 has now been also completed by the National Surety Company, and in connection with its final account for work done, at the agreed unit prices, it now claims also the full amount retained by the government, account of Schedules 1 and 2 (\$44,768.22), from estimates covering work done by Orman and Crook prior to January 22, 1908, and I am asked to decide whether said sum, in addition to pay for all work actually done by said Surety Company at the agreed rates, may properly be paid to it.

It is apparent, without argument or discussion, that the provisions of the Orman and Crook contract which purported to provide

"That in case of default by the contractor said 20 per cent shall be and become the sole and absolute property of the United States",

was a provision for a penalty or forfeiture, pure and simple, and as such can be enforced only to the extent of any actual damages sustained by the United States by reason of the failure of Orman and Crook to complete all the work covered by said contract in the manner and time agreed. (46 MS. Comp. Dec. 772, August 6, 1908; 16 Comp. Dec. 480). Except to the extent of any actual damages occasioned it by the default of Orman and Crook together with these costs and damages which Orman and Crook agreed to pay in the event of delay (see Par. 21, supra) the government had, at the time the contract of April 8, 1908, was made, and has now, no right what-

ever to the sums theretofore retained in accordance with the  
32 contract, or any right to hold the same beyond the final completion of the work or to dispose, or agree to dispose, of the same in any other manner or to any other person than as provided in the original contract with Orman and Crook.

Furthermore, in agreeing to complete Orman and Crook's unfinished undertaking, at the same rates and on the same terms as those



provided for in the original Orman and Crook contract, the National Surety Company did nothing more than it was already fully obligated to do under its existing contract of suretyship, and if it was the intent of the parties, by the contract of April 8, 1908, to provide for the payment to it of sums theretofore earned by Orman and Crook, in addition to pay at contract rates for all work thereafter done by it, then such provision could be construed only as utterly without authority on the one hand and as without consideration on the other, and therefore nudum pactum (16 Comp. Dec. 351, 490; 18 id. 254, 843; 8 id. 552).

It is understood that the National Surety Company bases its claim for the fund of \$44,768.22 in question on two grounds: (1) that the government agreed to pay the retained percentages to it as "the proper party in interest," and (2) that, in any event, having completed the work which Orman and Crook had agreed to complete, it is to be subrogated to the rights of Orman and Crook to any fund in the government's possession otherwise due Orman and Crook.

The first of these contentions, for reasons already noted, is untenable; the second, as will appear, is without merit.

The doctrine of subrogation is a pure unmixed equity (*Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534), and hence can be resorted to and applied only in or before a tribunal having equitable jurisdiction and powers. Both the executive and accounting officers of the government are limited in the power 33 given them to settle claims against the government, which come before them for adjudication, to claims having a legal as distinguished from an equitable basis (18 Comp. Dec. 379). Therefore, whatever claims, if any, the National Surety Company may have, equitably, i. e., by way of subrogation to all or any part of the fund of \$44,768.22 now in the hands of the government and nominally due Orman and Crook, it can enforce it, if at all, only in some court having equitable jurisdiction and powers.

But with respect to such claim, it will not be amiss to correct what appears to be an erroneous understanding of the circumstances that would justify the application of the doctrine of subrogation. It is not with respect to the rights of Ormand and Crook to the \$44,768.22, but with respect to the right of the Government to said fund that the National Surety Company could, in any event, or before any tribunal, properly claim to be subrogated. Therefore if the United States has no right to said fund, no right of subrogation exists in favor of said surety company at all. This will be clear from a brief résumé of the facts and controlling principles:

The contract of April 8, 1908, as already indicated, added not one whit to the liability theretofore existing against the surety company in favor of the United States, for under said contract it neither did nor agreed to do one thing that it was not already obligated either to do or have done. It was already fully bound under its contract of suretyship to see that Orman and Crook completed their contract, and the contract of April 8, 1908, imposed no added liability 34 in this or any other respect. It presumably undertook the completion of the contract for its own protection and because of its



liability as surety for the original contractors, and whether it was damages by the failure of Orman and Crook to complete their contract was and is no concern of the government, the government being concerned only with the matter of sustaining no damages itself on such account. That is a matter entirely between Orman and Crook and said surety company. If the surety company did suffer damages through Orman and Crook's default, i. e. if it cost it more to do the work than it received for doing it, that is a matter of claim and adjustment between it, as surety, and Orman and Crook, as principals. (18 Comp. Dec. 843.)

The \$44,768.22 in question was, subject always to the damages for default and delays, earned by Orman and Crook, and, except for a forfeiture which no court would recognize or enforce, now that all the contract work had been completed at the rates originally agreed upon and without extra cost, that sum is due Orman and Crook and must be paid to them or their legal representative. Except as indicated the government has no shadow of claim or right to said fund, and such claim as it has against it it can enforce against the National Surety Company also if need be. The right that the Government has against said fund it has against the National Surety Company also, as surety on the bond of Orman and Crook, and it is patent, therefore, that the United States having itself no rights against the fund, in toto, there are no rights perforce to which the National Surety Company, as between it and the Government, could, in any event be subrogated. (Hitchcock v. United States, 164 U. S. 227, 232.)

35 On the facts presented I have to advise you that you are not authorized to pay all or any part of the sum in question to the National Surety Company (8 Comp. Dec. 552; 18 id., 254).

While, as I think I have sufficiently indicated the National Surety Company is not, as a matter of legal right, entitled to all or any part of the fund in question, yet if there are substantial equities in its favor as between itself and the defaulting contractors, it might be a matter of grave injustice to pay the \$44,768.22 at this time to Orman and Crook, or their Trustee in bankruptcy, and nothing I have herein said with reference to the legal right of Orman and Crook to this money is to be construed either as advising or authorizing such payment. To pay the whole fund, at this time, over to the representative of the bankrupt firm might operate to deprive the National Surety Company altogether of any and all opportunity of adjusting and enforcing any equities it may have in the premises to all or a part of said sum, and if it has such equities, a fair opportunity should be given it for adjusting or enforcing the same.

A proper course would seem to be to give due notice both to Orman and Crook and to the surety company of the balance that is legally due Orman and Crook and call on them, by some reasonable date in the future, to adjust, as between themselves, any equities that may subsist in the premises and to agree as to the disposition to be made of the fund, under the alternative that the whole fund, in the absence of such agreement and of full releases on the part of both parties in



interest, will be paid to the representative of the bankrupt firm. In other words, it would seem the safe and fair thing to do to hold this fund for the present and until the National Surety Company, either by agreement or by court-proceedings, as it may elect, has had a reasonable opportunity of showing its rights to this fund or any part thereof. If, within a reasonable time after notice, neither by agreement with Orman and Crook or their legal representative, nor by appropriate court proceedings, the surety company has established its rights to all or a part of said fund, then payment should of course be made to Orman and Crook, or to their proper representative, if their affairs are still in bankruptcy.

Respectfully,

GEO E. DOWNEY,  
*Comptroller.*

*Replication of Plaintiff, National Surety Co.*

Filed October 2, 1914.

\* \* \* \* \*

Comes now the plaintiff, National Surety Company, and for reply to paragraphs eight and twenty of defendant's answer setting up an alleged counter claim against this plaintiff for an accounting and discovery of and concerning its complete operations and its receipts and disbursements of the machinery, tools, animals, materials and moneys about and concerning the contract involved in these proceedings, and its completion by the plaintiff or by the person or persons employed by the plaintiff, denies that it received any machinery, tools, materials or animals from the defendant or his predecessors in interest, but avers the fact to be that the machinery, tools, animals and materials referred to by the defendant in said paragraphs were received by this plaintiff, from the United States, under the terms of its contract with the United States dated April 8, 1908, set forth in its bill of complaint, and upon completion of the work said machinery, tools, animals and materials were returned to the Government, less such parts of the same as were properly consumed in the completion of the work and the plaintiff made full and satisfactory accounting to the United States of and concerning its operations and the receipt and disbursement of said machinery, equipment and materials. Plaintiff further avers, upon information and belief, that the United States, after receiving said machinery, tools, animals and materials back from the plaintiff, turned the same over to the defendant, and holds his receipt therefor, and further made an accounting to the defendant of and concerning said operations and machinery, equipment and materials, which was accepted by the defendant at that time as satisfactory. Plaintiff denies the right of the defendant to require it to make the discovery and accounting prayed for in said answer.

B. E. HINTON,  
*Attorney for Plaintiff.*

The Clerk will please calendar the above cause for hearing at the October term, 1914.

B. E. HINTON,  
*Attorney for Plaintiff.*

I consent.

J. S. EASBY-SMITH,  
By R. B. FLEHARTY,  
*Att'y for William L. Dayton.*

*Opinion.*

Filed July 9, 1915.

\* \* \* \* \*

The bill of complaint in the above entitled cause prays that the receipt by the Defendant Dayton, trustee, etc., of the sum of \$44,687.22, or any part thereof, be enjoined; and that the defendants Secretaries of the Interior and Treasury be enjoined from issuing a voucher, draft or warrant for said money to said Dayton, or otherwise disposing of the money until the further order of the  
38 Court. It also prays for the appointment of a receiver or receivers of said fund and others mentioned, and also that the Secretary of the Interior be ordered and directed to pay the sum of \$69,658.40, which includes the above mentioned amount of \$44,687.22, to the plaintiff or to a receiver or receivers to be appointed by the Court. It also prays that the plaintiff may be decreed to be entitled to receive the whole of said sum of \$69,658.40, and concludes with a prayer for general relief.

Pending the final hearing of the suit, and by the consent of all of the parties thereto, the Court appointed the Munsey Trust Company receiver of the fund in dispute, and by stipulation filed in this proceeding under date of July 21, 1914, between the plaintiff and the defendant Dayton, Trustee, etc., it was agreed that upon the payment to the receiver herein of the sum of \$69,628.30, such payment was deemed and acknowledged "as paid in full release, acquittance and discharge of the United States of and from" all claims and demands whatsoever in law and equity under or by virtue of the contracts out of which the suit arises. By an order passed herein on the 24th day of July, 1914, made upon a motion of the plaintiff and by consent of the defendant Dayton, Trustee, etc., the receiver was authorized, upon receipt from the United States of the sum to be paid to it as heretofore stated, to pay to the plaintiff \$24,860.08, which was done, leaving in the hands of the receiver as the subject for final decree between the plaintiff and the defendant Dayton, Trustee, etc., the sum of \$44,768.22. The money was paid to the receiver by the Secretary of the Treasury, and under date of August 7, 1914, the suit was dismissed as to the defendants Secretaries of the Interior and Treasury.



39 For the purpose of this opinion and the decree to be based thereon, the material facts which are found by the Court to be established by the evidence adduced, are as follows: Under date of August 30, 1905, the Secretary of the Interior advertised for proposals

"for the construction of an earthen dam and appurtenances, and 17½ miles of canals, involving about 2,600,000 cubic yards of earth-work, 3,000 cubic yards of rock excavation, 24,000 cubic yards of concrete masonry, and 45,000 pounds of steel and cast iron. The work is located about 12 miles northeasterly from Belle Fourche, S. Dak."

The advertisement also informed prospective bidders that specifications and forms of proposal might be obtained from the Chief Engineer of the Reclamation Service at Washington, and that plans might be inspected at that office or at the office of the Reclamation Service in Denver, Colorado, and Belle Fourche, S. Dak. A notice to bidders was also given, in which this language appears:

"Bids will be received on one or more schedules, complete, and a bidder may be awarded as many or as few of the schedules on which he has bid as the interest of the Service may require.

"Each bid must be accompanied by a certified check for \$15,000 for Schedule No. 1, \$3,000 for Schedule No. 2, and \$2,000 for Schedule No. 3, payable to the order of the Secretary of the Interior, as a guaranty that the bidder will, if successful, promptly execute a satisfactory contract and furnish bonds in the sum of \$100,000 for Schedule No. 1, and \$10,000 each for Schedules Nos. 2 and 3, for the faithful performance of the work."

Among the bidders was the firm of Orman and Crook, copartners, and their bid, which was the one accepted by the Government, was dated October 26, 1905, and proposed

"to do all the work and to furnish all the materials, except cement, for the construction and completion of Belle Fourche dam and distribution canals, Belle Fourche Project, S. Dak., in accordance with the advertisement and attached specifications, and bind ourselves, on the acceptance of this proposal, to enter into and execute a contract, with necessary bond, of which this proposal, the said advertisement and specifications shall be made a part for performing and completing said work and supplying said materials at the prices named in the schedules hereto annexed."

40 The specifications and forms of proposal prepared by the Government contemplated the doing of this work under three separate schedules known therein as Schedules Nos. 1, 2 and 3, Orman and Crook's bids under Schedule No. 1 totalled \$879,164.00; under Schedule No. 2, \$71,129.75; and under Schedule No. 3 \$53,005.50; but in submitting their bid, Orman and Crook inserted the provision that "This bid is for all works in Schedules Nos. 1, 2 and 3, or none!"

As has already been stated, this bid or proposal of Orman and Crook was accepted by the Government, and thereupon there was



duly executed a contract between said bidders and the United States through the Secretary of the Interior. This contract was dated November 14, 1905, and provided among other things that Orman and Crook were to

"construct and complete the Belle Fourche dam and distribution canals, Belle Fourche project, South Dakota; Schedules one, two and three, in accordance with terms of the attached advertisement, proposal, and specifications, the same being made a part of this contract,"

and it further provided that the contractors were to be paid:

"upon the presentation of proper accounts approved by the Chief Engineer of the Reclamation Service, the Director of the Geological Survey, and by the Secretary of the Interior, in the following manner, viz: as provided in paragraphs 38 and 104 of the specifications."

Paragraph No. 104 of the specifications, referred to in the last above quoted provision of the contract, provided that payments to the contractors would be made as follows:

"At the end of each calendar month the engineer shall make an approximate measurement of all the work done or materials delivered, up to that date, and an estimate of the value of the same, at the prices agreed upon in the contract. A deduction of 20 per cent shall be made from this estimated amount and from the balance shall be deducted the amount of all previous payments. The remainder shall be paid to the contractor upon the presentation of proper accounts, prepared by the engineer and approved by the chief engineer. The 20 per cent so deducted shall be retained by  
41 the Government until the work shall have been completed to the entire satisfaction of the chief engineer, and in case of default by the contractor said 20 per cent shall be and become the sole and absolute property of the United States. In the case of Schedule No. 1, after the amount so retained equals \$40,000 the contractor shall be paid the full value of the work done or the materials delivered during each month, and in the case of each of Schedules Nos. 2 and 3 after the amount retained equals \$5,000 the foregoing deduction of 20 per cent shall no longer be made, but the contractor shall be paid the full value of the work done or materials delivered during each month. The balance due upon completion of the contract shall be paid as provided in paragraph 38."

Paragraph 38 of said specifications, also referred to in the provisions last quoted from the said contract, provides as follows:

"The payments due shall be made to the contractor upon the presentation of proper accounts, prepared by the engineer and approved by the chief engineer, in accordance with the provisions made therefor and pertaining to the contract. When the work has been completed or all the material has been delivered, to the satisfaction of the chief engineer, and when a release of all claims against the United States on account of the contract shall have been executed by the contractor, final payment of the balance due will be made."

Contemporaneously with the execution of the said contract, Or-



man and Crook entered into a bond with the National Surety Company, the plaintiff in this suit, as its surety, in the penal sum of \$120,000, the obligee being the United States of America, and the condition of the bond was:

"That if the said James B. Orman and William Crook, partners, doing business under the firm name and style of Orman & Crook, their heirs, executors, administrators, or assigns, or any of them, shall and do in all things well and truly observe, perform, fulfill, accomplish and keep all and singular the covenants, conditions, and agreements whatsoever, which on the part of the said principal- and each of their heirs, executors, administrators and assigns are or ought to be observed, performed, fulfilled, accomplished and kept, comprised or mentioned in certain articles of agreement bearing date the 14th day of November, 1905, between the said principal- and Secretary of the Interior concerning the construction and completion of Schedules One (1). Two (2) and Three (3) of  
42 the Belle Fourche Dam, and distribution Canals, Belle Fourche Project, South Dakota, according to the true intent and meaning of said articles of agreement, and shall promptly make payment to all persons supplying labor and materials for the prosecution of the work provided for, then the above obligation to be void, otherwise to remain in full force and virtue."

About a year before Orman and Crook made their said bid to do this work, to be exact, under date of October 21, 1904, they had entered into a general contract with the National Surety Company, plaintiff herein, whereby they agreed to apply to said Company for the execution of any and all bonds which they might desire or be required to give during a term of one year from the date of said agreement, and the said company agreed to execute such bonds under certain restrictions and limitations which, however, have no application to this case, and in pursuance of this agreement they, something more than a year after the date of the agreement, that is to say, under date of November 10, 1905, applied to said National Surety Company to execute the bond required by the terms of the Government's specifications hereinbefore mentioned. Said bond was executed accordingly. This general contract or agreement provided among other things:

"Fourth. The Applicant and the Guarantors hereby indemnify and agree at all times to keep indemnified the Company, and hold and save it harmless from and against any and all demands, liabilities, charges and expenses of whatsoever kind or nature, including counsel and attorneys' fees, which it shall at any time sustain or incur by reason or in consequence of executing any and every bond or undertaking whatsoever, at the instance and request, or in behalf of the Applicant, and to pay over, reimburse and make good to the Company, its successors and assigns, all sums and amounts of money which the Company or its representatives shall pay or cause to be paid, or become liable to pay under its obligation upon any such bond or undertaking, or as charges and expenses of whatsoever kind or nature, including counsel and attorneys' fees, by reason of the execution thereof, or in connection with any litigation, investi-



gation or other matters connected therewith, such payment to be made to the Company as soon as it shall have become liable therefor, whether it shall have paid out such sum or any part thereof or not, and without regard to whether the Company may have taken or may hold other security or indemnity or not."

43 The contractors proceeded with the work until January 16, 1908, when they filed in the appropriate District Court of the United States, their voluntary petition in bankruptcy, and thereupon, under date of January 22, 1908, the United States, exercising the power reserved to it by paragraph numbered 22 of said specifications, suspended the operation of the contract between it and said Orman and Crook. The material portions of paragraph numbered 22 of the specifications are as follows: Should the contractor fail to

"prosecute the work or delivery in such manner as to insure a full compliance with the contract within the time limit, or should any question arise as to whether or not the contractor is properly carrying out the provisions of his contract in their true intent and meaning, at any time during the progress of the work, notice thereof in writing shall be served upon him, and upon his neglect or refusal to provide means for a more energetic and satisfactory compliance with the contract within the time specified in such notice, then and in either case the Secretary of the Interior shall have the power to suspend the operation of the contract, and he may take possession of all machinery, tools, appliances, and animals employed on any of the works to be constructed under the contract and of all materials belonging to the contractor delivered on the ground, and may use the same to complete the work, or he may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for in such manner as he may deem proper, or hire such force and buy such machinery, tools, appliances, materials, and animals at the contractor's expense as may be necessary for the proper conduct of the work and for finishing it in the time agreed upon. Any excess of cost arising therefrom over and above the contract price will be charged against the contractor and his sureties, who shall be liable therefor."

Formal notice of this action by the Secretary of the Interior was communicated, under date of January 27, 1908, to the plaintiff Surety Company by a letter from the Acting Director of the Reclamation Service of the Department of the Interior in the following language:

44 "Your company being surety on the bond of Orman & Crook of Pueblo, Colorado, said bond being given to secure faithful performance of their contract dated November 14, 1905, for the construction of the Belle Fourche dam and distribution canals, Belle Fourche project, South Dakota, under the Act of Congress approved June 17, 1902 (32 Stat. 388), you are informed that on January 22, 1908, the Secretary of the Interior, under the terms of Paragraph 22 of the specifications, suspended the operation of the contract and the United States has taken possession of all



machinery, tools, appliances and animals employed on the works and of all materials belonging to the contractors delivered on the ground, and the contract will be prosecuted to completion in whatever manner may be hereafter determined by the proper officers of the Government".

In a letter dated January 30, 1908, the said Acting Director of the Reclamation Service informed the plaintiff Surety Company, among other things, as follows:

"I also enclose copy of contract estimate for December, 1907, from which it will be seen that there is a total holdback of \$45,000 on this contract, namely, \$40,000 on Schedule 1 and \$5,000 on Schedule 2, all work on Schedule 3 having been completed and holdback released.

"The total gross earnings on this contract, as shown by the enclosed estimate, amount to \$362,161.91, and this sum has been paid less the \$45,000 holdback provided for in paragraph 104 of the specifications, and liquidated damages in the sum of \$7,050 provided for in paragraph 103 of the specifications".

Again, under date of February 1, 1908, the Acting Director of the Reclamation Service wrote to the plaintiff Surety Company as follows:

"Referring to the suspension of the contract of Orman & Crook for constructing the Belle Fourche dam and distributing canals, Belle Fourche project, South Dakota, on which you are surety, I have to state that action in regard to completing this work is now in abeyance pending the receipt of information from you as to what, if anything, your company proposes to do in the matter. I, therefore, suggest that the investigation which it is understood your company is making be carried to completion as early as practicable, and this office promptly advised of the result."

It is established by the evidence that the plaintiff Company, immediately upon learning of the bankruptcy of Orman and  
45 Crook and of the suspension by the Secretary of the Interior of work under their contract with the United States, and because of its obligation to the United States as surety on the bond of Orman and Crook, undertook to secure bids for the completion of the work in a manner that would be satisfactory to the United States and save it from loss. This it finally succeeded in doing and entered into a contract with Hayes Brothers Company and John W. Peters. This contract, which is dated April 2, 1908, after reciting that the National Surety Company was surety for Orman and Crook under their said contract with the United States, makes it, together with the advertisement, proposal, and specifications upon which it is based, a part of the new contract. It further recites that Orman and Crook had completed the work designated in Schedule 3, but had only partially completed the work described in Schedules 1 and 2. It recites the bankruptcy of Orman and Crook and the suspension of the work under their contract by the Secretary of the Interior and that the Secretary desired the plaintiff Company, as surety for Orman and Crook to complete their said contract, and that the said Secretary was willing to enter into a contract with



the Surety Company for such completion upon the Company furnishing said Secretary with a satisfactory contractor who would complete the work for the Surety Company. It further recites that the agreed price for all the work included in the specifications to be paid to Orman and Crook was \$1,003,299.25, of which price Orman and Crook had received \$310,111.91, leaving a balance of said contract price amounting to \$693,187.34 yet to be paid by the United States for the completion of the work, which balance included the deductions or holdbacks on Schedule 1 of \$40,000 and on Schedule 2 of \$5,000. and certain penalties charged against Orman and Crook

46 for failure to complete Schedules 2 and 3 within the contract time, said penalties amounting to \$7,050, which penalties the contractors under this contract of April 2, 1908,

were advised might be remitted by the United States, and the contractors agree with the plaintiff Company to complete the uncompleted work in the manner, and pursuant in all respects, to the terms and conditions set forth in Orman and Crook's contract, and in accordance with the requirements of the specifications, plans and profiles thereof, for the doing of which they are to be paid (1) the sum or balance to be paid by the United States under the Orman and Crook contract, which sum or balance including the deductions or holdbacks of \$45,000 heretofore mentioned amounted to \$693,187.34; (2) the above mentioned penalties of \$7,050; and (3) the further sum of \$14,050 to be paid by the plaintiff Company. The plaintiff Company agreed to procure from the United States an extension to not earlier than December 1, 1910, of the time within which the work included in Schedule 1 of the Orman and Crook contract might be completed. It also agreed to assign to the contractors all warrants and to pay over to them all moneys received from the United States upon estimates of work done by said contractors, and to assign all warrants and pay over all moneys received by it from the United States for the aforesaid deductions or holdbacks on Schedules 1 and 2, and for the penalties charged against Orman and Crook as hereinbefore mentioned, within five days after such warrants or payments or any of them should have been received by the Company, and in addition the Company agreed to pay said contractors the sum of \$14,050; \$7,000 thereof to be paid on or before May 20, 1908, and the balance on or before October 20, 1908. This contract further provided that it was subject

47 to all the terms of the specifications and of the contract between Orman and Crook and the United States, and that the contractors were also bound for the completion of the uncompleted work in such manner as if they had been the contractors with the United States, and they were to look to the payments to be made by the United States for their compensation, and the plaintiff Company was not to be liable to said contractors for any greater sum than \$14,050, except as under the contract otherwise agreed. It further provided that should the United States fail or refuse to enter into a contract with the plaintiff Company on or before April 10, 1908, for the completion of said work as agreed therein, the



contract between the plaintiff Company and Hayes Brothers Company and John W. Peters was thereupon immediately to cease and become null and void.

The plaintiff Company, pursuant to the terms of the contract between it and Hayes Brothers Company and John W. Peters, entered into a contract with the United States, the same being dated April 8, 1908, whereby the plaintiff Company, being described therein as the surety on the Orman and Crook bond, agreed to construct and complete the work left uncompleted by the said Orman and Crook in accordance with the terms and at the prices set forth in the Orman and Crook contract. It also contained all the requirements of the Hayes Brothers Company and Peters contract, excepting the provision for the waiving of the penalties which had been imposed by the Government on Orman and Crook. It provided for payment to the plaintiff Company as provided in paragraphs No. 38 and 104 of the specifications attached to and forming part of the Orman and Crook contract, and it further provided that:

“Upon the completion of the contract, the percentage heretofore retained under the provisions of paragraph 104 of the specifications shall, subject to the provisions of said contract of November 48 14, 1905, be paid to the proper party in interest, viz: the party of the second part”. (The National Surety Company, plaintiff herein.)

Hayes Brothers Company and Peters thereupon proceeded to complete the work, and they did complete it to the satisfaction of the Government; and at the time that the bill of complaint in this suit was filed, all payments provided for in these contracts had been made, excepting the sum of \$24,860.18, the deductions or holdbacks which have heretofore been mentioned and the penalties amounting to \$7,050, which the United States refused to waive, although, notwithstanding said refusal, Hayes Brothers Company and Peters proceeded with the work under their contract with the plaintiff Company. As has already been stated, the balance of the contract price, amounting to \$24,860.18 has been paid to the plaintiff Company by the receiver herein by consent of the contending parties and there remains for disposition by the decree of this Court, the sum of \$44,798.22, being the amount now representing the deductions or holdbacks under Schedules No. 1 and 2, the difference between this sum and the sum of \$45,000, which was the amount deducted or held back by the United States, not being explained, but nevertheless agreed to by the plaintiff and the defendant Dayton, Trustee, etc. The Court finds from the evidence that the moneys to be paid to Hayes Brothers Company and Peters, as hereinbefore set forth, represented the best, that is, the lowest, price for which the plaintiff Company was able to secure the completion of the work left uncompleted by Orman and Crook, and that it exhibited diligence and good faith towards Orman and Crook and their trustee in bankruptcy, the defendant Dayton, in securing this price for the completion of the work.

The Court further finds from the evidence that the plaintiff Com-



pany urged trustee Dayton to undertake the completion of the Orman and Crook contract himself, but he declined, upon the ground that there was no money or means available to him to carry on the work.

When the work was completed by Hayes Brothers Company and Peters, the plaintiff Company demanded from the United States the payment of the balance of the contract price, including the deductions or holdbacks under Schedules 1 and 2 hereinbefore described, but payment of said deductions or holdbacks was refused by the United States in consequence of an opinion of the Comptroller of the Treasury under date of November 11, 1913, rendered as a result of a request from the Secretary of the Interior for his decision as to the propriety of paying to the plaintiff the sum of \$44,768.22, representing the amount of said deductions or holdbacks. A copy of this opinion attached to the answer of the defendant Dayton, as Defendant's Exhibit No. 6, while advising the Secretary that he is not authorized to pay all or any part of said sum to the plaintiff Company adds that

"If there are substantial equities in its (meaning the plaintiff Company) favor as between itself and the defaulting contractors, it might be a matter of grave injustice to pay \$44,768.22 at this time to Orman and Crook, or their trustees in bankruptcy, and nothing I have herein said with reference to the legal right of Orman and Crook to this money is to be construed either as advising or authorizing such payment. To pay the whole fund, *at this time*, over to the representative of the bankrupt firm might operate to deprive the National Surety Company altogether of any and all opportunity of adjusting and enforcing any equities it may have in the premises to all or a part of said sum, and if it has such equities, a fair opportunity should be given it for adjusting or enforcing the same."

And again,

"In other words, it would seem the safe and fair thing to do to hold this fund for the present and until the National Surety Company, either by agreement or by court proceedings, as it may elect, has had a reasonable opportunity of showing its right to this fund or any part thereof."

50 (The underscoring in the quoted matter of this opinion is made by the Court).

The basis of the Comptroller's opinion seems to be that the provision in the Orman and Crook contract, which provides that "in case of default by the contractor such twenty per cent shall be and become the sole and absolute property of the United States," was a provision for a penalty or forfeiture pure and simple, and as such could be enforced only to the extent of any actual damage sustained by the United States by reason of the failure of Orman and Crook to complete all the work covered by said contract in the manner and time agreed, and that except to the extent of any and all damages occasioned it by the default of Orman and Crook, the Government had, at the time the contract between it and the plaintiff Company of April 8, 1908, heretofore set out, was made, and at the time of the writing of the Comptroller's opinion, no right whatever to the sums theretofore retained in accordance with the contract, or any right to



hold the same beyond the final completion of the work, or to dispose of or agree to dispose of the same in any other manner or to any other person than as provided in the original contract with Orman and Crook. He proceeds to state what he understands is the position of the plaintiff Company as to the bases of its claim to the fund in dispute, these bases being, first, that the Government agreed to pay the retained percentages to the plaintiff Company in its aforesaid contract with it as "the proper party in interest"; and, second, that in any event, having completed the work which Orman and Crook had agreed to complete, it is to be subrogated to the rights of Orman and Crook to any fund in the Government's possession otherwise due Orman and Crook. He holds, for reasons stated by him, that

51 the first position is untenable, and that the second is without merit, this latter upon the ground that the doctrine of subrogation cannot be applied by the executive and accounting officers of the Government in the settlement of claims against it, and that the doctrine could only be resorted to or applied in a tribunal having equitable jurisdiction and powers. And he further points out what, in his opinion, appears to be an erroneous understanding of the circumstances that would justify the application of the doctrine of subrogation, which, he says, in this case, is not with *the* respect to the rights of Orman and Crook to the \$44,768.22, but with respect to the right of the Government to said fund, and that the plaintiff Company could only properly claim to be subrogated to the right of the Government, and that if it had no right to said fund, no right of subrogation existed in favor of the plaintiff Company; and discussing the matter from that standpoint, the Comptroller concludes that whether the plaintiff Company was damaged by the failure of Orman and Crook to complete their contract was of no concern to the Government, that that was a matter entirely between Orman and Crook and the Surety Company, and that if the Surety Company did suffer damage through Orman and Crook's default, "i. e., if it cost more to do the work than it received for doing it, that is a matter of claim and adjustment between it, as surety, and Orman and Crook, as principals."

There is great force in the reasoning of the Comptroller. The plaintiff Company took up the matter of completing the work contracted to be performed by Orman and Crook only because it was liable as surety upon their bond to the Government for the faithful performance of the terms and conditions of the contract, and  
52 only to the extent of the penalty of the bond. The work has long since been completed and accepted by the Government, and the liability of the plaintiff Company to the United States ceased when the Government accepted the work as completed. The plaintiff Company had a right to look to Orman and Crook for reimbursement for all moneys that it was compelled to pay out as their surety in order to complete the work, and no more than this. In this view of the matter, what has it cost the Surety Company to accomplish a completion of the work contracted to be performed by Orman and Crook? Only that which was paid in securing the contract from Hayes Brothers Company and John W. Peters, and in addition what it con-



tracted to pay these parties over and above what remained of the original contract price under the Orman and Crook contract. The cost and expense incurred and paid out by the plaintiff Company in securing the Hayes Brothers Company and Peters contract was \$918.50, which amount was expended by them at different times and in different amounts beginning with March 10, 1908; the amounts and the dates when they were paid hereafter appear. In addition to that, as has already been stated, it contracted to pay and did pay to Hayes Brothers Company and Peters the sum of \$14,050, in two payments; the amounts of which and the times of payment also hereafter appear. By its contract with the new contractors, the plaintiff Company also agreed

“to assign all warrants and to pay over to the contractors all money received by the Company from the United States of America upon estimates of work done by the contractors under said contract of Orman & Crook, and to assign all warrants and to pay over all moneys received by the Company from the United States of America for holdbacks on Schedules One and Two, and for penalties charged against Orman & Crook as aforesaid, within five days after such warrants or payments or any of them shall have been received by the Company.”

53 And this the Company has done, in so far as it received such warrants and money from the United States, but, as has already been pointed out, the United States refused to pay to the plaintiff Company any portion of the so-called holdbacks as it also refused to refund the penalties charged against Orman and Crook amounting to \$7,050. It is true that in the contract between the plaintiff Company and the United States, heretofore referred to and quoted from, the United States contracted that

“Upon the completion of the contract, the percentage heretofore retained under the provisions of paragraph 104 of the specifications shall, subject to the provisions of the said contract of November 14, 1905, be paid to the proper party in interest, viz: the party of the second part” (This latter being the plaintiff Company).

But the Court is of the opinion that the United States had no right, power or authority to undertake to pay this percentage to the plaintiff Company, at least unless it appeared that the plaintiff Company had expended the amount of the percentage in the completion of the work, or had become liable to any other person or persons to pay the same, and this, as has already been pointed out, has not occurred. The retained percentages represented work that had been done by Orman and Crook, and was only retained by the United States under its contract with Orman and Crook as an additional security to insure the completion of the contract, and the Surety Company could have no better or greater right to this percentage than the Government itself. It may be that Hayes Brothers Company and Peters may suffer a loss represented by the amount of this percentage, but it is evident that they have no claim against the plaintiff Company for its inability to secure the payment of the percentage from the United States. The plaintiff Company has



54      done all that Hayes Brothers Company and Peters could require of it under the contract between them and it, towards securing the payment of this percentage by the United States Government.

The plaintiff Company claims that among the costs and expenses that it incurred and paid out to secure the contract for the completion of the work by Hayes Brothers Company and Peters is the sum of \$1,150, representing a contribution made by it to the premium on the bond that it exacted from Hayes Brothers Company and Peters under their contract of April 2, 1908. That payment seems to have been a voluntary one by the plaintiff Company, and seems to have been made because Hayes Brothers Company and Peters discovered, after entering into their contract with the plaintiff Company that they had somewhat underestimated the amount it would take to complete the work undertaken to be done by Orman and Crook. The contract between the plaintiff Company and Hayes Brothers Company and Peters provided in article 3:

"III. The contractors (meaning Hayes Brothers Company and Peters) agree to furnish to the Company (meaning the plaintiff Company) on or before April 10, 1908, their bond in the sum of Ninety Thousand (90,000) Dollars, in form satisfactory to the Company, with corporate surety, which shall be approved by the Company, such bond to be conditioned for the faithful performance of this contract by the contractors."

There is no evidence in this suit of any subsequent enforceable agreement whereby Hayes Brothers Company and Peters could have compelled the payment by the plaintiff Company of the said contribution to the payment of the premium on the bond in question. It seems rather to have been an act of grace on the part of the plaintiff Company, and designed to reduce or to prevent a possible loss by Hayes Brothers Company and Peters under their contract with it.

In view of the foregoing, the Court is of the opinion, based upon the law and evidence in the case, that the plaintiff Company is entitled to be paid out of the fund in controversy, and now in the hands of the receiver the following amounts:

55      (1) The sum of \$14,050, being the amount it obligated itself to pay to Hayes Brothers Company and John W. Peters under the aforesaid contract of April 2, 1908, and which the Court finds from the evidence it has paid, together with interest upon \$7,000 of this amount from May 20, 1908, the date of its payment; and upon \$7,050 of this amount from October 20, 1908, the date of its payment, until paid.

(2) The sum of \$918.50, together with interest upon \$75.00 of this amount from March 10, 1908, the date of its payment; upon \$100.00 of this amount from March 30, 1908, the date of its payment; upon \$23.70 of this amount from April 3, 1908, the date of its payment; upon \$35.00 of this amount from April 7, 1908, the date of its payment; upon \$212.80 of this amount from April 11, 1908, the date of its payment; upon \$150.00 of this amount from

April 24, 1908, the date of its payment; and upon \$322.00 of this amount from June 12, 1908, the date of its payment, until paid.

(3) Its taxable costs incurred in this suit.

The remainder of the fund in controversy, less the proper costs of the receivership, must, as between the plaintiff Company and the Defendant Dayton, as trustee in bankruptcy of Orman and Crook, be paid to the latter; and a decree will be signed accordingly.

F. L. SIDDONS, *Justice*.

*Decree.*

Filed August 31, 1915.

\* \* \* \* \*

56 This cause came on to be heard at this term; and thereupon, upon consideration thereof, it is, this 31st day of August, 1915;

Adjudged, ordered and decreed:

1. That the plaintiff is entitled to recover, and that there be paid to said plaintiff, or to Bynum E. Hinton its attorney of record in this cause, by the Receiver of this court in this cause, out of the fund in said Receiver's possession, the sum of Fourteen thousand, nine hundred and sixty-eight Dollars and fifty cents (\$14,968.50) with interest at the rate of six per cent per annum, as follows:

|    |            |      |               |    |            |
|----|------------|------|---------------|----|------------|
| On | \$7,000.00 | from | May 20, 1908, | to | this date. |
| On | 7,050.00   | "    | Oct. 20, 1908 | "  | " "        |
| On | 75.00      | "    | Mar. 10, 1908 | "  | " "        |
| On | 100.00     | "    | Mar. 30, 1908 | "  | " "        |
| On | 23.70      | "    | Apr. 3, 1908  | "  | " "        |
| On | 35.00      | "    | Apr. 7, 1908  | "  | " "        |
| On | 212.80     | "    | " 11, 1908    | "  | " "        |
| On | 150.00     | "    | " 24, 1908    | "  | " "        |
| On | 322.00     | "    | Jun- 12, 1908 | "  | " "        |

2. That the said plaintiff recover its taxable costs in this cause, and that the same be paid to said plaintiff, or to its said attorney of record in this cause, by said Receiver out of said fund.

3. That the defendant William L. Dayton, Trustee in Bankruptcy of James B. Orman and William Crook, is entitled to recover, and that there be paid to said defendant Dayton or to James S. Easby-Smith, John L. Hargrove and Paul V. Keyser his attorneys of record in this cause, by said Receiver, the remainder of said fund.

F. L. SIDDONS, *Justice*.

From the foregoing decree the plaintiff, the National Surety Company, in open Court notes an appeal to the Court of Appeals, which is allowed by the Court. Whereupon a bond for costs is fixed in the penal sum of \$100, and the penalty of a bond to operate as a supersedeas is fixed in the sum of One Thousand Dollars (\$1,000).

This 31st day of Aug. 1915.

F. L. SIDDONS, *Justice*.



57

*Memoranda.*

September 23, 1915.—Bond on Appeal of Plaintiff for \$100 approved and filed.

October 14, 1915.—Time to submit bill of exceptions extended to November 1, 1915.

November 1, 1915.—Time to submit statement of evidence and bill of exceptions extended to November 10, 1915, and to file transcript of record, to November 26, 1915.

November 10, 1915.—Statement of evidence and bill of exceptions submitted.

*Assignments of Error.*

Filed November 19, 1915.

\* \* \* \* \*

Now comes the National Surety Company, appellant, and complains that the decree entered in the above entitled cause on the 31st day of August, 1915, is erroneous and unjust to appellant.

First. Because the Court erred in holding and decreeing that any part of the reserved percentage involved in this litigation and now in the hands of the receiver of the Court is due and payable to defendant, William L. Dayton, trustee in bankruptcy of Orman & Crook, and in not holding that the entire fund in question should be paid to appellant, the National Surety Company.

58 Second. Because the Court erred in holding that the United States was without right, power, or authority to undertake to pay to the National Surety Company the reserved percentage involved in this litigation, unless it appeared that the company had expended the amount of said percentage in the completion of the work, or had become liable to pay such an amount; and in not holding that the United States, by virtue of its contract of November 14, 1905, with Orman & Crook had the right, power, and authority, under the circumstances of this case, to contract with the appellant, National Surety Company, as it did in the said contract of April 8, 1908, to pay over to the appellant company the said reserve percentage upon completion of the work originally undertaken by said Orman & Crook.

Third. Because the Court erred in holding in effect that the Government secured the completion of the said contract of Orman & Crook without the necessity of resorting to this reserve percentage, and in not holding that the Government found it necessary to resort to said reserve percentage and obligate itself to pay the same over to the said National Surety Company in order to get the said contract of Orman & Crook completed.

Fourth. Because the Court erred in refusing to admit in evidence the pleadings in the suit now pending in the Circuit Court of Rock County, Wisconsin, brought by the new contractors, Hayes Brothers & Company and John W. Peters, and wherein the question of the extent of plaintiff's liability on its contract of April 2, 1908, with

said new contractors for the completion of this work, is in litigation and has not yet been decided.

Fifth. Because the Court erred in holding and decreeing that any part of the fund now in litigation is now due and payable to appellee, William L. Dayton, trustee in bankruptcy of Orman & Crook, and in not holding that the entire fund involved in this litigation should be either paid to the appellant company or should be held by the receiver subject to the control and direction of this Court until the full extent of appellant's liability, arising by reason of its having executed the said bond of Orman & Crook, has been established, and the appellant company has been completely exonerated therefrom.

Sixth. Because the Court erred in overruling the motion of appellant company to inquire into and fix the value of the services of appellant company's attorney in this cause and in holding that the appellant company is not entitled to be reimbursed for the expense of said services by defendant Dayton, or have the same paid out of the funds of said Dayton, if any, remaining in the hands of the Court.

Wherefore, the said appellant, the National Surety Company, prays that the said decree of the Supreme Court of the District of Columbia be reversed.

BYNUM E. HINTON,  
*Attorney for National Surety Company,*  
*Plaintiff and Appellant.*

*Designation of Record.*

Filed November 19, 1915.

\* \* \* \* \*

In preparing the transcript of record on appeal we request that the Clerk include the following:

Original bill, filed February 27, 1914, omitting exhibits.

Answer of defendant, William L. Dayton, trustee, filed September 11, 1914, omitting all exhibits with the exception of Defendant's Exhibit No. 6.

Replication of plaintiff, National Surety Company, filed October 2, 1914.

60 Decree appointing receiver, entered July 21, 1914.

Order authorizing receiver to make partial distribution entered July 24, 1914.

Opinion of the Court, filed July 9, 1915.

Final decree entered August 31, 1915.

Assignment of errors filed November 19, 1915.

This designation of record.

BYNUM E. HINTON.



*Order Extending Time & Making Statement of Evidence Part of Record.*

Filed November 26, 1915.

\* \* \* \* \*

Upon motion of attorney for the plaintiff it is by the Court this 26th day of November, 1915, Ordered, That the time for filing transcript of record in the Court of Appeals in the above entitled case be and the same is hereby extended to December 6th, 1915. The statement of evidence this day approved is hereby made a part of the record in this cause.

F. L. SIDDONS, *Justice.*

61 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 60, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 32470 in Equity, wherein National Surety Company, a corporation of the State of New York is Plaintiff and Franklin K. Lane, Secretary of the Interior, et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the City of Washington, in said District, this 6th day of December, 1915.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

62 In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 32470.

NATIONAL SURETY COMPANY, Plaintiff,

vs.

FRANKLIN K. LANE et al., Defendants.

*Statement of Evidence and Bill of Exceptions.*

Be it remembered that this cause came on for hearing and trial before Mr. Justice Siddons, sitting as a Court of Equity. There were

present on behalf of the plaintiff, Bynum E. Hinton, and on behalf of the defendant, Mr. James S. Easby-Smith, Mr. John L. Hargrove, and Mr. Paul V. Keyser.

Thereupon the plaintiff, to maintain the issue on its behalf joined called as a witness WILLIAM J. GRIFFIN, who, being first duly sworn, testified on direct examination as follows:

That he is the Vice President and General Solicitor of plaintiff company and has been such for about thirteen or fourteen years; that plaintiff in 1905 became surety on the bond of Orman & Crook for the completion of a contract with the United States for certain reclamation work at Bellefourche, South Dakota. Plaintiff introduced in evidence the said contract with Orman & Crook and the bond on which the plaintiff company was surety. The material parts of this contract and of the advertisement, specifications and proposal, made part of the same, and also the condition in full of the bond, are set forth in the opinion of the Court filed herein.

63      Witness also testified that Orman & Crook made application for said bond in writing, which said application was in words and figures as follows:

11/10/1905.

National Surety Company, New York, N. Y.

GENTLEMEN: Under our general contract with you, you are hereby requested to execute a bond pursuant to the following information:

|                                           |                       |
|-------------------------------------------|-----------------------|
| Name and Address of Principal.....        | Orman & Crook.        |
| Name and Address of party to whom bond    |                       |
| is to run .....                           | U. S. of America.     |
| Amount of Bond .....                      | \$120,000 in three    |
|                                           | bonds of \$100,000.   |
|                                           | \$10,000 & \$10,000.  |
| Amount of Contract.....                   | \$1,003,299.00.       |
| Nature of Contract.....                   | See copy of contract. |
| Period after completion during which work |                       |
| must be kept in repair.....               | None.                 |

Yours truly,

ORMAN & CROOK,  
By JAMES B. ORMAN.

Plaintiff also introduced in evidence the general agreement dated October 21, 1904, between Orman & Crook and the National Surety Company, under which said bond was applied for and written. The material part of said general agreement is set forth in the opinion of the Court filed herein. Witness testified that Orman & Crook defaulted under said contract on January 16, 1908, upon going into voluntary bankruptcy, and that the Government suspended the operation of said contract and took possession of all machinery, tools, and appliances, etc. of Orman & Crook on the work. Plaintiff thereupon introduced in evidence letters from the Acting Director of the Reclamation Service to the plaintiff company dated January 27,



1908, January 30, 1908 and February 1, 1908, notifying the surety of the suspension of the contract and advising it that action in regard to completing the work was being held in abeyance pending receipt of information as to what if anything the surety company proposed to do in the matter. The material parts of these letters  
64 are set forth in the Court's opinion.

Plaintiff introduced evidence tending to show that the plaintiff company immediately upon learning of the bankruptcy of Orman & Crook and the suspension of the contract by the Secretary of the Interior, undertook to secure bids for the completion of the work that would be satisfactory to the United States; that it finally succeeded in doing so and entered into a contract with Hayes Bros. Company and J. W. Peters. This contract was in words and figures as follows:

Agreement made this second day of April, A. D., 1908, between the National Surety Company, a New York Corporation, (hereinafter called the Company), and Hayes Brothers Company, a Corporation organized under and pursuant to the laws of the State of Wisconsin and with its principal office at the City of Janesville, in said State of Wisconsin, and John W. Peters, of the same place, (hereinafter called the contractors)

Witnesseth:

Whereas, the Company is surety for the co-partnership of Orman & Crook of the City of Denver in the State of Colorado, consisting of James B. Orman and William Crook, contractors with the United States of America, acting by its Secretary of the Interior (hereinafter called the Secretary) for the construction and completion of the Belle Fourche Dam and Distribution Canals, Belle Fourche Project, South Dakota, Schedules One, Two and Three, in accordance with the terms of the advertisement, proposal, specifications and contract therefor, which contract is dated the Fourteenth day of November, 1905, copies of said advertisement, proposal, specifications and contract being hereby referred to and annexed hereto, and made a part of this agreement with the same force and effect as if copied at length herein; and

Whereas, said Orman & Crook have completed the work designated in Schedule Three, but have only partially completed the work described in Schedule One and Two; and

Whereas, said Orman & Crook as partners and individuals have filed a voluntary petition in bankruptcy, and have heretofore discontinued all work under their contract as aforesaid, and the United States of America, acting by the Secretary in accordance with the terms of said specifications, which were made a part of said Orman & Crook contract, did suspend all work of said Orman & Crook under said contract and the operation thereof, and did take possession of all machinery, tools, appliances and animals employed on the said work to be constructed under the contract, and of all materials belonging to the Contractor delivered on the ground; and

65 Whereas, under said specifications, upon such suspension, the Secretary was authorized to employ other parties to carry the said contract to completion; and



Whereas, the Secretary desires the Company as surety for said Orman & Crook aforesaid, to complete the said contract of Orman & Crook, so far as same remains uncompleted and said Secretary is willing to enter into a contract with the Company for such completion upon the Company furnishing said Secretary with satisfactory contractor or contractors who will complete the said work for the Company; and

Whereas, the Contractors having examined the advertisement, and specifications aforesaid, the contract between the United States of America and Orman & Crook, and the plans and profiles in connection therewith, agree that they are wholly familiar with the same, and said contractors having visited the work described in said advertisement, specifications, contract plans and profiles, agree that they are wholly familiar with the character and amount of work left uncompleted by Orman & Crook, and which remains to be completed by the Company as surety; and said Contractors having also inspected the plant and materials of said Orman & Crook taken into possession by the Secretary under said specifications as aforesaid, agree that they are wholly familiar with the character and condition of said plant and materials; and

Whereas, the time for completion of the whole of the work of Schedule One of said specifications as required thereby is September 1, 1909, but the Secretary has advised the Company that upon its undertaking the completion thereof and furnishing satisfactory contractor or contractors, the time for completion of the work of said Schedule One shall be extended to at least December 1, 1910; and,

Whereas, the aggregate agreed price for all work included in said specifications, Schedules One, Two and Three, to be paid Orman & Crook for completion thereof, is one million, three thousand two hundred ninety-nine and 25/100 (1,003,299.25) Dollars, of which price Orman & Crook have received the sum of three hundred and ten thousand one hundred and eleven and 91/100 (310,111.91) dollars, leaving the balance of said contract price, amounting to six hundred and ninety-three thousand one hundred eighty-seven and 34/100 (\$693,187.34) dollars yet to be paid by the United States of America for the completion of the work, in which balance are included hold-backs on Schedule One of forty thousand (40,000) dollars on Schedule Two, five thousand (5,000) Dollars, and penalties charged against Orman & Crook of seven thousand and fifty (7,050) dollars, for failure to complete Schedules Two and Three within the contract time, but which penalties the Company is advised may hereafter be remitted by the United States of America and paid to the company additional to the estimates for completed work, when the whole work has been completed, if the Company undertake said completion; and

Whereas, the Contractors have agreed with the company to complete the whole of the work described in said advertisement, specifications, contract, plans and profiles left uncompleted by Orman & Crook for the amounts and upon the terms and conditions hereinafter stated:

66 I. The Contractors agree with the Company in consideration of the moneys to be paid in the manner hereinafter stated,



and the Mutual covenants contained in this agreement to proceed not later than April 20th, 1908, to promptly and diligently complete the whole of the uncompleted work described as follows: In Schedule One of said specifications, on or before December 1, 1910; in Schedule Two of said specifications, on or before May 1, 1908, in the manner and pursuant in all respects to the terms and conditions set forth in said Orman & Crook contract, and in accordance with the requirements of said specifications, plans and profiles of said work, which contract and specifications are annexed hereto and identified by the signatures of the parties upon page three of the contract and pages eleven to fourteen of the specifications, respectively; and to pay for all material, labor and supplies furnished, used or necessary, in upon or about said work, purchased by the Contractors hereto, and to discharge any attachments or liens that may be filed by any person, persons, firms, companies or corporations, furnishing the contractors with such materials, labor and supplies. The moneys to be paid the contractors therefor shall be the sum or balance to be paid by the United States of America under the contract of Orman & Crook aforesaid, and which sum or balance is understood to be six hundred forty-one thousand, one hundred thirty-seven and 34/100 (641,137.34) dollars, to which is to be added and paid by the United States of America the holdbacks on Schedules One and Two, as above set forth, aggregating forty-five thousand (45,000) dollars, and penalties aggregating seven thousand and fifty (7,050) dollars, and the further sum of fourteen thousand and fifty (14,050) dollars, to be paid by the Company to the Contractors as hereinafter set forth.

II. The Contractors shall have the use of the plant, horses, mules and materials of Orman & Crook taken into possession by the Secretary upon the suspension of the contract of Orman & Crook, as aforesaid, an inventory of which is now or may be hereafter annexed, marked Schedule "A", the Contractors at the completion of the work herein agreed to be done, or upon the default by the Contractors, resulting in the further suspension of the contract by the United States of America, or the Company, to return at the place where received, the plant, horses, mules, and the materials, if any there be left, to the Company in as good condition as reasonable wear and tear occurring in the progress of the work will permit. The Company agrees that the Contractors shall have the use of said property without charge during the progress of said work, and until completion thereof and will protect and defend the Contractor against a superior claim on the part of any other person affecting the possession of any of said property.

III. The Contractors agree to furnish to the Company on or before April 10, 1908, their bond in the sum of ninety thousand (90,000) dollars, in form satisfactory to the Company, with corporate surety, which shall be approved by the Company, such bond to be conditioned for the faithful performance of this contract by the Contractors.

67 IV. The Company agrees to procure from the United States of America, acting by its Secretary of the Interior, the right to the contractors to the use without charge, of the said plant, horses and mules and materials of Orman & Crook taken into



possession upon suspension of the contract of Orman & Crook as aforesaid until completion of the work and to procure an extension to not earlier than December 1, 1910, of the time for completion of the work included in Schedule One of the said annexed advertisement and specifications.

V. The Company agrees to assign all warrants and to pay over to the contractors all money received by the Company from the United States of America upon estimates of work done by the contractors under said contract of Orman & Crook, and to assign all warrants and to pay over all moneys received by the Company from the United States of America for holdbacks on Schedules One and Two, and for penalties charged against Orman & Crook as aforesaid, within five days after such warrants or payments or any of them shall have been received by the Company, and in addition thereto, the Company agrees to pay the Contractors the sum of fourteen thousand and fifty (14,050) dollars, and no more, which latter sum shall be in full for all other obligations and liabilities of the Company to the Contractors, Seven Thousand Dollars (7,000) thereof on or before May 20, 1908, and the balance Seven Thousand and Fifty (7,050) Dollars on or before October 20, 1908.

VI. It is agreed that the Contractors undertake no liability hereunder for any material or labor claims unpaid by said Orman & Crook upon such work.

VII. It is agreed that should the Contractors fail to begin work promptly as aforesaid, or fail to begin the delivery of material, as provided in the specifications and contract of Orman & Crook, or fail, to prosecute the work or delivery in such manner as to insure a full compliance with the said specifications and contract of Orman & Crook, within the time limit, as extended to December 1, 1910, as hereinbefore provided, or should any question arise as to whether or not the Contractors are properly carrying out the provision of the said specifications and contract of Orman & Crook, or of this contract, in their true intent and meaning at any time during the progress of the work, notice of ten (10) days thereof in writing shall be mailed, postage prepaid to the Contractors at Orman, South Dakota, and upon their neglect or refusal to provide means for a more energetic and satisfactory compliance with said specifications and contract of said Orman & Crook, and this contract, within the time specified in such notice, then and in either case, the Secretary of the Interior aforesaid or the Company shall have the power to suspend the operation of this contract, and the Secretary of the Company may take possession of all machinery, tools, appliances and animals employed on any of the works to be constructed under said specifications and contract, and all materials belonging to the contractors delivered on the ground, and may use the same to complete the work; or the Secretary or the Company may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for, in such manner as the Secretary or the Company may deem proper, or hire such force and buy such machinery, tools, appliances, materials and animals at the Contractors' expense



68 as may be necessary for the proper conduct of the work, and for finishing it in the time agreed upon, which is understood to be December 1, 1910. Any excess of cost arising therefrom over and above the contract price, as provided for in this agreement, will be charged against the Contractors and their sureties, who shall be liable therefor. The failure to order improvement of methods, or increase of force, plant, or efficiencies, will not relieve the Contractors from their obligation to perform the work or finish in the time agreed upon.

VIII. The contractors will be held responsible for, and be required to make good, at their own expense, any and all damages of whatsoever nature to persons or property caused by carelessness, neglect, or want of due precaution on the part of Contractors, their agents, employees or workmen. They will not allow any of their agents, employees or workmen to trespass upon the premises or lands of persons in the vicinity of the works, and will discharge at the request of the engineer, designated in the specifications hereinbefore referred to, any one in their employ who may be guilty of committing such damage.

IX. In case the work hereinbefore provided for is not completed on the date or dates required, a deduction of fifty (50) dollars per day will be made from the amount allowed by the United States of America under the aforesaid contract of Orman & Crook for said Schedule for each and every day the work remains uncompleted as liquidated damages for loss to the United States of America, or to the Company on account of such delay. This sum will include the value to the United States of America of the use of the work as well as the cost of engineering, superintendence, etcetera, as appraised under the provisions of paragraph twenty-one (21) of the specifications hereinbefore referred to.

X. This Contract shall be subject to all the terms of the specifications and of the contract of Orman & Crook hereto annexed and to the plans and profiles on file in the office of the United States Reclamation Service relating to said work herein agreed to be done, it being the true intent of the parties hereto that the Contractors shall be bound thereby for the completion of the uncompleted work aforesaid in the same manner as if they had been the Contractors with the United States of America in the place of Orman & Crook, and said Contractors shall look to the payments to be made by the United States of America for their compensation for all work done hereunder, and the Company shall not be liable to the Contractors for any greater sum than fourteen thousand and fifty (14,050) dollars as aforesaid, except as hereinbefore expressly agreed.

XI. Should the United States of America fail or refuse to enter into contract with the Company on or before April 10, 1908 for the completion of said work as herein agreed including provision for the use by the Company of the plant, material and animals of Orman & Crook, the extending of the time for the completion of Schedule one to December 1, 1910, and for the payment of forty five thousand (45,000) dollars holdback as hereinbefore referred to upon the completion of said contract, and waiving any forfeiture thereof to the said United States and upon the same terms as to prices for the uncom-



possession upon suspension of the contract of Orman & Crook as aforesaid until completion of the work and to procure an extension to not earlier than December 1, 1910, of the time for completion of the work included in Schedule One of the said annexed advertisement and specifications.

V. The Company agrees to assign all warrants and to pay over to the contractors all money received by the Company from the United States of America upon estimates of work done by the contractors under said contract of Orman & Crook, and to assign all warrants and to pay over all moneys received by the Company from the United States of America for holdbacks on Schedules One and Two, and for penalties charged against Orman & Crook as aforesaid, within five days after such warrants or payments or any of them shall have been received by the Company, and in addition thereto, the Company agrees to pay the Contractors the sum of fourteen thousand and fifty (14,050) dollars, and no more, which latter sum shall be in full for all other obligations and liabilities of the Company to the Contractors, Seven Thousand Dollars (7,000) thereof on or before May 20, 1908, and the balance Seven Thousand and Fifty (7,050) Dollars on or before October 20, 1908.

VI. It is agreed that the Contractors undertake no liability hereunder for any material or labor claims unpaid by said Orman & Crook upon such work.

VII. It is agreed that should the Contractors fail to begin work promptly as aforesaid, or fail to begin the delivery of material, as provided in the specifications and contract of Orman & Crook, or fail, to prosecute the work or delivery in such manner as to insure a full compliance with the said specifications and contract of Orman & Crook, within the time limit, as extended to December 1, 1910, as hereinbefore provided, or should any question arise as to whether or not the Contractors are properly carrying out the provision of the said specifications and contract of Orman & Crook, or of this contract, in their true intent and meaning at any time during the progress of the work, notice of ten (10) days thereof in writing shall be mailed, postage prepaid to the Contractors at Orman, South Dakota, and upon their neglect or refusal to provide means for a more energetic and satisfactory compliance with said specifications and contract of said Orman & Crook, and this contract, within the time specified in such notice, then and in either case, the Secretary of the Interior aforesaid or the Company shall have the power to suspend the operation of this contract, and the Secretary of the Company may take possession of all machinery, tools, appliances and animals employed on any of the works to be constructed under said specifications and contract, and all materials belonging to the contractors delivered on the ground, and may use the same to complete the work; or the Secretary or the Company may employ other parties to carry the contract to completion, substitute other machinery or materials, purchase the material contracted for, in such manner as the Secretary or the Company may deem proper, or hire such force and buy such machinery, tools, appliances, materials and animals at the Contractors' expense



68 as may be necessary for the proper conduct of the work, and for finishing it in the time agreed upon, which is understood to be December 1, 1910. Any excess of cost arising therefrom over and above the contract price, as provided for in this agreement, will be charged against the Contractors and their sureties, who shall be liable therefor. The failure to order improvement of methods, or increase of force, plant, or efficiencies, will not relieve the Contractors from their obligation to perform the work or finish in the time agreed upon.

VIII. The contractors will be held responsible for, and be required to make good, at their own expense, any and all damages of whatsoever nature to persons or property caused by carelessness, neglect, or want of due precaution on the part of Contractors, their agents, employees or workmen. They will not allow any of their agents, employees or workmen to trespass upon the premises or lands of persons in the vicinity of the works, and will discharge at the request of the engineer, designated in the specifications hereinbefore referred to, any one in their employ who may be guilty of committing such damage.

IX. In case the work hereinbefore provided for is not completed on the date or dates required, a deduction of fifty (50) dollars per day will be made from the amount allowed by the United States of America under the aforesaid contract of Orman & Crook for said Schedule for each and every day the work remains uncompleted as liquidated damages for loss to the United States of America, or to the Company on account of such delay. This sum will include the value to the United States of America of the use of the work as well as the cost of engineering, superintendence, etcetera, as appraised under the provisions of paragraph twenty-one (21) of the specifications hereinbefore referred to.

X. This Contract shall be subject to all the terms of the specifications and of the contract of Orman & Crook hereto annexed and to the plans and profiles on file in the office of the United States Reclamation Service relating to said work herein agreed to be done, it being the true intent of the parties hereto that the Contractors shall be bound thereby for the completion of the uncompleted work aforesaid in the same manner as if they had been the Contractors with the United States of America in the place of Orman & Crook, and said Contractors shall look to the payments to be made by the United States of America for their compensation for all work done hereunder, and the Company shall not be liable to the Contractors for any greater sum than fourteen thousand and fifty (14,050) dollars as aforesaid, except as hereinbefore expressly agreed.

XI. Should the United States of America fail or refuse to enter into contract with the Company on or before April 10, 1908 for the completion of said work as herein agreed including provision for the use by the Company of the plant, material and animals of Orman & Crook, the extending of the time for the completion of Schedule one to December 1, 1910, and for the payment of forty five thousand (45,000) dollars holdback as hereinbefore referred to upon the completion of said contract, and waiving any forfeiture thereof to the said United States and upon the same terms as to prices for the uncom-

69      pleted work as provided in the contract of Orman & Crook,  
this contract shall immediately cease and become null and  
void.

XII. The Company agrees to furnish to the Contractors on or before April 10, 1908, a copy of the Contract entered into between the United States of America and the Company for the completion of the work hereinbefore referred to.

In witness whereof, the parties hereto have caused this agreement to be signed by the Officers proper for the purpose, and the corporate seals of said companies to be hereto affixed, duly attested the day and year first above written.

NATIONAL SURETY COMPANY,  
By WILLIAM J. GRIFFIN,  
1st Vice President.

Attest:

H. L. BOHANNAN,  
Res. Ass't Secretary.

HAYES BROTHERS COMPANY,  
By MICHAEL HAYES, President.

Attest:

H. H. JACKSON, Secretary.

Signed, sealed and delivered in the presence of  
WILLIAM G. WHEELER.

STATE OF ILLINOIS,  
County of Cook, ss:

On this Second day of April A. D. 1908, before me appeared William J. Griffin to me known who being duly sworn deposes and says that he resides in the City of New York, State of New York and is the First Vice President of the National Surety Company the Corporation above mentioned, that he knows the corporate seal of said corporation, that the seal affixed thereto is such corporate seal and was so affixed by order of the Board of Directors of said Corporation.

ALFRED L. FRASER,  
Notary Public in and for the County of Cook, Ill.

STATE OF ILLINOIS,  
County of Cook, ss:

On this Second day of April A. D. 1908, before me appeared Michael Hayes to me known, who being by me duly sworn deposes and says that he resides in the City of Janesville, and is the President of Hayes Brothers Company, the Corporation above mentioned that he knows the corporate seal of the said corporation, that the seal affixed thereto is such corporation seal and was so affixed by order of the Board of Directors of said Corporation.

ALFRED L. FRASER,  
Notary Public in and for the County of Cook, Ill.



70       The plaintiff company pursuant to the terms of the contract between it and Hayes Bros. Company and John W. Peters entered into a contract with the United States, which said contract was in words and figures as follows:

This agreement, made and entered into this 8th day of April, one thousand nine hundred and eight, by and between the United States of America, acting in this behalf by James Rudolph Garfield, Secretary of the Interior, party of the first part, and the National Surety Company, a corporation duly organized and existing under the laws of the State of New York, and doing business in New York, N. Y., party of the second part, its successors and assigns,

Witnesseth: That in pursuance of authority for the construction of irrigation works contained in the act of Congress approved June 17, 1902 (32 Stat. 388) entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands", the parties hereto have mutually covenanted and agreed, and by these presents do covenant and agree with each other as *as* follows:

Article 1. The party of the second part being surety on the bond given in connection with the contract dated November 14, 1905, between Orman & Crook, of Pueblo, Colo., and the United States of America, acting in this behalf by E. A. Hitchcock, Secretary of the Interior, agrees to construct and complete the work therein provided for left uncompleted by Orman and Crook in accordance with the terms and at the prices set forth in said contract, the operation of which was suspended by the Secretary of the Interior under date of January 22, 1908 pursuant to the terms of paragraph 22 of the specifications forming a portion of said contract, the same being made part hereof to the same effect as if herein written in full:

Provided, that the time of completion of Schedule No. 1. of said contract is hereby extended to December 1, 1910, and the party of the second part shall be allowed the use without charge of all machinery, tools, appliances, and animals taken over by the United States under the terms of paragraph 22 of the specifications, hereinabove referred to.

Article 2. For and in consideration of the faithful performance of the stipulations of this contract, the party of the second part shall be paid upon the presentation of proper accounts prepared by the engineer and approved by the chief engineer, as provided in paragraphs 38 and 104 of the specifications attached to and forming part of said contract of November 14, 1905. Upon completion of the contract, the percentage heretofore retained under the provisions of paragraph 104 of the specifications shall, subject to the provisions of the said contract of November 14, 1905, be paid to the proper party in interest, viz: the party of the second part.

71       Article 3. The party of the second part agrees to save, keep, bear harmless, and fully indemnify the United States and any of its officers or agents from all damages, costs, or expenses in law or equity that may at any time arise or be set up for any infringement of the patent rights of any person or persons in consequence



of the use by the Department of the Interior, or by any of its officers or agents, of articles supplied under this proposal, and of which the party of the second part is not the patentee, or assignee, or lawfully entitled to sell the same.

Article 4. It is expressly understood by the party of the second part that in conformity with the requirements of Section 3737 of the Revised Statutes, neither this contract nor any interest therein shall be transferred to any other party or parties, and that any such transfer shall cause the annulment of the contract so far as the United States is concerned; all rights of action, however, for any breach of this contract by the contracting parties being reserved to the United States.

Article 5. It is further expressly understood that no Member of, or Delegate to, Congress, officer, agent or employee of the Government is or shall be admitted to any share or part of this contract, or to any benefits which may arise therefrom, and the provisions of Sections 3739, 3740, 3741 and 3742, of the Revised Statutes of the United States relating to contracts enter into and form a part of this agreement, so far as the same may be applicable.

In Witness Whereof, the undersigned have hereunto subscribed their names and affixed their seals, the day and year first above written.

(Signed)

JAMES RUDOLPH GARFIELD,  
*Secretary of the Interior, for and  
on Behalf of the United States of  
America, Party of the First Part.*

NATIONAL SURETY COMPANY,  
By WM. B. JOYCE, *Prest.,*  
*Party of the Second Part.*

Attest:

DAVID W. ARMSTRONG, JR.,  
*Secretary.*

Plaintiff further introduced testimony tending to show that said Hayes Bros. Company and Peters thereupon proceeded with the work and completed it to the satisfaction of the Government; and that at the time that the bill of complaint in this suit was filed all payments provided for in this contract had been made  
72 excepting the sum of \$24,860.18, the holdbacks of \$44,198.22, and the penalties named in the foregoing contracts of \$7,050, which the United States refused to waive; that the terms upon which Hayes Bros. & Peters agreed to complete this work as represented in the aforesaid contract of April 2, 1908, were the best terms and the lowest price which the plaintiff company was able to secure after diligent effort and inquiry among the best and biggest contractors throughout the United States, and that the plaintiff exhibited diligence and good faith toward Orman & Crook and their trustee in bankruptcy in securing the completion of the work upon these terms.

Plaintiff further introduced in evidence a letter from the plaintiff company dated April 3, 1908, to the Director of the Reclamation



Service at Washington, D. C., which was in words and figures as follows:

National Surety Company,  
115 Broadway.

NEW YORK, Apr. 3, 1908.

Address reply to Office of Vice President, William J. Griffin, Vice President & General Solicitor.

Director Reclamation Service, Washington, D. C.

DEAR SIR: We have negotiated a contract with Hayes Brothers Co. and John W. Peters of Janesville, Wisconsin, for the completion of the Orman & Crook contract at Belle Fourche, South Dakota. The contractors have made the following conditions of the validity of the contract;

"XI. Should the United States of America fail or refuse to enter into contract with the Company on or before April 10, 1908, for the completion of said work, as herein agreed, including provision for the use by the Company of the plant, material and animals of Orman & Crook, the extending of the time for the completion of Schedule One to December 1, 1910, and for the payment of Forty Five Thousand (45,000) Dollars hold-back hereinbefore referred to upon the completion of said contract, and waiving any forfeiture thereof to the United States, and upon the same terms as to prices for the uncompleted work as provided in the contract of Orman & Crook, this contract shall immediately cease and become null and void."

"XII. The Company agrees to furnish to the Contractors on or before April 10, 1908, a copy of the contract entered into  
73 between the United States of America and the company for the completion of the work hereinbefore referred to."

On account of these conditions it will be necessary that the contract to be entered into between the United States and this Company include the conditions imposed by paragraph "XI" above.

Relying upon the telegram addressed to the writer, dated April 1st, signed by Mr. Newell, viz:

"Under paragraph 104 of specifications of Orman & Crook, Belle Fourche, contract, holdback will be retained until work has been completed to satisfaction of Chief Engineer. It will not be forfeited unless required to reimburse the Government for loss or damage. Time of completion will be extended to December 1, 1910, as requested."

the writer felt entirely safe in agreeing that the contract between the Government and the Company should contain the condition as to hold-back of \$45,000, as stated in Paragraph "XI" of the contract hereinbefore quoted.

In accordance with the writer's telephone conversation with Mr. Bien to-day, we shall be indebted for a form of the contract con-

taining provisions as above stated at as early a time as may be possible.

Very truly yours,

WILLIAM J. GRIFFIN,  
*1st Vice President.*

Plaintiff also introduced in evidence a letter dated April 8, 1908, from the Director of the Reclamation Service to the Secretary of the Interior with endorsement thereon by G. W. Woodruff, Assistant Attorney General, which letter and endorsement were in words and figures as follows:

Department of the Interior,  
United States Reclamation Service.

WASHINGTON, D. C., April 8, 1908.

The Honorable the Secretary of the Interior.

SIR: I transmit herewith draft of a contract to be prepared for execution with the National Surety Company, surety on the bond of Orman & Crook for the construction of certain work on the Belle Fourche project.

Schedule 2 is practically completed, requiring but a small amount of work which can be done in a short time. Schedule 1 is the main dam and a large amount of work is required for completion. Orman and Crook went into bankruptcy last January and the contract was suspended by your order of January 22, 1908.

The Surety Company has made diligent efforts to secure the completion of the work and has now made arrangements which must be concluded at once, as the parties undertaking to do the work require that a copy of the contract with the United States be submitted to them by April 10, at Janesville, Wisconsin. The draft of contract as herewith submitted is fully satisfactory to both parties, except in one particular. On Schedule 2 there is a retained  
74 percentage of \$5,000 and on Schedule 1, a retained percentage of \$40,000 which is now held by the Government under the terms of the contract.

The Surety Company is of the opinion, under the decision of the U. S. Supreme Court in the case of *Prairie State Bank* against the United States (164 U. S. 227) that if the contract be completed in accordance with the specifications the surety will be subrogated to the rights of the United States and be entitled to receive the \$45,000 retained under this work.

In order to effectuate this understanding, the last sentence of Article 2 has been made to read as follows:

"Upon the completion of the contract the percentage heretofore retained under the provisions of Paragraph 104 of the specifications shall, subject to the provisions of the said contract of November 14, 1905, be paid to the proper party in interest, viz., the party of the second part."

This office recommends that before this draft be approved the matter be submitted to the Assistant Attorney General in order to



determine whether the execution of the same would place upon the Government any liability for this payment in addition to the requirements under the existing contract with Orman and Crook. In other words, whether in case of the completion of the contract in accordance with the specifications the National Surety Company is the proper party in interest to receive the said holdback of \$45,000. This office has no knowledge of any rights or interests of other parties which would prevent the application of the principles of the Prairie State Bank case. I trans-it a copy of the specifications forming part of the Orman & Crook contract.

Mr. W. J. Griffin, Vice President and General Counsel of the National Surety Company, is in the city and will appear before the Assistant Attorney General prepared to discuss any questions which may arise.

In view of the urgency of the case, I suggest that a decision be rendered in the matter today, if possible.

Very respectfully,

F. H. NEWELL, *Director.*

April 8, 1908.

The contract submitted with this letter has been examined, and in view of the fact that Orman and Crook have abandoned their work, that the time for its completion has already been extended to December 1, 1910, because of the failure of Orman and Crook to carry out their contract, that under the decision of the United States Supreme Court in the case of *Prairie State Bank v. United States* (164 U. S. 227) it will be legally possible to pay to the surety company instead of to Orman and Crook, not only the holdback of \$45,000 but all other money which may fall due because of the completion of the work, and that the United States, having the right at this time to take up and operate the work itself, has also the right to turn it over to any other capable and responsible party, and by this contract will do so,—I am of opinion that the  
75 contract submitted herewith should be executed at once.

G. W. WOODWUFF,  
*Assistant Attorney General.*

Approved:

JAMES RUDOLPH GARFIELD, *Secretary.*

Plaintiff further introduced evidence tending to show that the plaintiff company after suspension of this work and the bankruptcy of Orman & Crook, urged trustee, Dayton, to undertake the completion of the Orman & Crook contract himself. Witness Griffin testified that the surety company made no profit out of the arrangement; that the surety company through the agency of Hayes Bros. and Peters took over from the Government the materials, machinery, etc. left on the work by Orman & Crook, and that upon the completion of the contract, that part of the plant and materials which had not been used in the completion of the work was turned back to the Government and in turn delivered over to trustee, Dayton, and his



receipt was taken therefor, which receipt, dated July 1, 1911, was introduced in evidence.

Plaintiff introduced evidence tending to show that by reason of having executed the bond mentioned in these proceedings the plaintiff had expended the sums set forth in the bill of complaint and for the purposes therein mentioned, and tending to show that the amounts paid in each particular were reasonable and that the plaintiff was entitled to reimbursement from defendant Dayton out of the fund involved in these proceedings. The witness testified, however, that the payment of \$1,150.00 on account of the premium on the bond of Hayes Brothers and Peters was a voluntary contribution made by the Surety Company to help out Hayes Brothers and Company after the contract was signed, because the premium on the bond was larger than the new contractors had estimated.

Witness further testified that the National Surety Company has been sued in Wisconsin by Hayes Bros. and John W. Peters on the said contract of April 2, 1908, entered into for the completion of this work, and that the suit had been tried but not yet decided. The plaintiff offered to introduce in evidence the exemplified copies of the pleadings in that case to show what the suit was for and what the answer of the surety company to the suit was; to show that Hayes

76      Bros. Company and Peters in said suit are asserting against the National Surety Company the claims set forth in paragraphs 15 and 16 of plaintiff's bill of complaint and that those questions have not been finally determined by that Court or any other Court of competent jurisdiction, and that, therefore, the full extent of plaintiff's liability or loss by reason of having executed the bond aforesaid has not been finally determined. The attorneys for defendant Dayton objected to the admission of said pleadings, but offered to admit on the record that the new contractors Hayes Bros. Company and Peters are claiming and demanding from the surety company \$44,768.22, and that the surety company have defended that suit on the ground that the Government is claiming that it is not payable to the surety company but to the original contractors, Orman & Crook.

The Court: I think that with the admission of the trustee in bankruptcy here you have all you are entitled to under the pendency of that suit. I will sustain the objection to the introduction of that exemplified record, to which ruling of the Court the National Surety Company then and there duly excepted.

On cross examination the witness testified that shortly after getting information that Orman & Crook had defaulted, he promptly telegraphed and wrote his agents all over the West to obtain bids, and that in writing to these various contractors concerning the work he told them that the Government had \$40,000.00 or \$45,000.00, which was there to be paid over and above the contract price, and that he did this in first addressing them and giving that information as a basis for their bids.



Thereupon the plaintiff called as a witness, RALPH W. SMITH, who being first duly sworn, testified as follows:

That he is the Vice President of the plaintiff company located at Denver, Colorado, where he has been for eighteen years; that he is well acquainted with defendant, William L. Dayton; that following the execution by the plaintiff of the contract of April 8, 1908, between the plaintiff company and the Government for the completion of this work, he had a conversation with said Dayton and notified him that the plaintiff had entered into this contract to go ahead and complete the work; that Dayton asked him about the contract; that Dayton said that he had expected to file a petition to get this holdback.

76½ Q. Did you or not tell him at the time that you had made the contract with the Government, agreeing to turn over to you the holdbacks upon the completion of the work? A. Yes sir.

Q. Then as I understand you, you explained to him fully the nature of the arrangement which had been made to complete this work? A. I stated to him all these facts which I knew; the different bids, and the contract with the Government, and the holdback that was held, and the contract that we had entered into with Hayes Bros. & Peters.

Mr. Easby-Smith:

Q. Mr. Dayton was a lawyer?

Witness: Yes sir.

Plaintiff by this witness introduced further testimony tending to show that the plaintiff company prior to having itself entered into a contract for the completion of the work urged trustee Dayton to undertake the completion of the Orman & Crook contract himself, but he declined upon the ground that he had no money or means available, and that the creditors were sick of the contract and would not advance any more money.

On cross examination witness testified that he sent to Mr. William J. Griffin the letter dated February 7, 1908, introduced in evidence as part of the file of correspondence produced by the plaintiff company, in which letter he said: "Referring to the trustee, I beg to say that Mr. William L. Dayton, one of my very warm personal friends, was appointed trustee in this case yesterday \* \* \* I can definitely state that he will not in the least be unfriendly to this company, but will desire to do anything and everything to assist us along lines of fairness to the estate. We trust that this will meet with your approval. Now that a trustee has been appointed who will not be unfriendly to our interests, I conceive my duties to be in this case to simply report to you as to what Mr. Bradbury desires to do." He further testified that he had nothing to do with preparing the contracts between the Surety Company and Hayes Brothers and Peters, and took no part in the negotiations leading up to the formulation of that contract and had nothing to do with the preparation of the contract between the United States and the Surety Company.

On re-direct examination the witness testified:



By the Court:

Q. Do you know if Mr. Dayton was informed, by you or anyone connected with the Surety Company, of the making of the contract with Hayes Brothers & Peters? A. Yes, sir: I notified him.

Q. And of the terms and provisions? Was he informed?  
77 A. Yes, sir; I told him what we had—I had kept him informed, as well as I could, of negotiations right along, then, just as soon as I heard from the company of the contract, which was in the middle of April, I immediately went right over and told him.

Q. Told him what—that a contract had been made? A. Yes, sir; that we had entered into a contract with Hayes Brothers and Peters to continue the work and complete it.

Q. You went into the details of the contract? A. All the details that I had I gave him.

Q. What were they? A. Well, I cannot say just what. I know that—I recall that I went and told him everything I knew about it, because we were both very good friends, and I wanted to keep him informed as he had *mept* me informed.

By Mr. Hinton:

Q. Do you remember whether or not you told him of the provision of the contract with reference to paying over the reserved percentage?

Mr. Easby-Smith: I object to that. It is leading and suggestive, and the witness has several times been interrogated upon that very point.

The Court: He had just said that he did not recall the details of what was said.

Mr. Hinton: It seems to me that we should be able to ask, as to particular provisions, what was done.

The Court: If he does not recall the details, he cannot recall particular ones. It is leading.

The objection by Mr. Easby-Smith to the last question put by Mr. Hinton is sustained.

Mr. Hinton: That is all, if your Honor please.

78 On Re-cross examination witness testified that he sent to the office of the plaintiff company at New York the telegram dated January 17, 1908, introduced in evidence as part of the file of correspondence produced by the plaintiff company, in which he said: "Think can arrange friendly receiver," and that by this he probably meant that he had conferred with some of the creditors and that we could get one which was not obnoxious; that it was about the middle of April when he notified Mr. Dayton that the contract had been let; that he did not remember whether at that time he had seen a written copy of the contract.

Counsel for the plaintiff company was interrogated by the Court, and in reply stated on the record that the plaintiff's position is that it is not bound by its contract with Hayes Brothers Company and Peters to pay them the amount of the hold-backs in dispute in this suit unless it, the plaintiff, first receives the money from the Government or through this Court.



After the close of the hearing and after the filing of the written opinion of the Court herein, and before the signing of the final decree entered herein, the plaintiff, through its attorney B. E. Hinton, presented to the Court an affidavit of B. E. Hinton showing the services rendered by him as attorney for plaintiff under his retainer in this cause, and moved the Court to ascertain and fix the reasonable value of said services, and allow the same to the plaintiff as a proper charge against the assets of defendant, Dayton, if any, remaining in the hands of the receiver herein. Upon consideration thereof, and upon the objection of defendant Dayton, the Court overruled said motion, to which ruling of the Court the National Surety Company then and there duly excepted.

The foregoing is a correct abstract or digest of all of the testimony taken in the above entitled cause. Attorneys for both sides desiring certain parts of the testimony of certain witnesses reproduced in the exact words of the witnesses and the Court approving thereof, the same is allowed.

Dated Nov. 26, 1915.

F. L. SIDDONS, *Justice.*

Examined and approved—

B. E. HINTON,

*Attorney for National Surety Co.*

PAUL V. KEYSER,

*Of Counsel for Deft Dayton.*

[Endorsed:] Equity No. 32470. National Surety Co., Plaintiff, vs. Franklin K. Lane et al., Defendants. Statement of Evidence and Bill of Exceptions. Submitted Nov. 10/15. W. F. Sener, Clerk, Cir. Ct. No. 2. Bynum E. Hinton, Attorney at Law, Munsey Building, Washington, D. C.

Endorsed on cover: District of Columbia Supreme Court. No. 2903. National Surety Company, a Corporation, appellant, vs. Franklin K. Lane, Sec'y, &c., et al. Court of Appeals, District of Columbia. Filed Dec. 6, 1915. Henry W. Hodges, clerk.